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No. 90-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE UPJOHN COMPANY,

Petitioner,

v.

NORTH HAVEN PLANNING AND ZONING COMMISSION and SCOTT SCHATZLEIN,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, consistent with the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.*, a local government may ban disposal of locally generated hazardous waste within its borders, even though the federal Environmental Protection Agency has approved a local disposal plan as safe and the local government has not established that the plan is unsafe.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Upjohn Company states that it has no parent company and that its subsidiaries, other than wholly owned subsidiaries, are Admiral Espanola, S.A.; Chugai-Upjohn, Inc.; Cobb-Vantress, Inc.; Complejo Asgrow Semillas-S.A.; and Saudi Urethane Chemicals Company.

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PETITION FOR A WRIT OF CERTIORARI

The Upjohn Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 921 F.2d 27. The opinion of the United States District Court for the District of Connecticut (Pet. App. 4a-22a) is reported at 753 F. Supp. 423.

JURISDICTION

The court of appeals entered judgment on December 14, 1990. Pet. App. 1a. On March 5, 1991, Justice Marshall extended the time for filing a petition for a writ of cer-

tiorari to and including March 21, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The principal statutory provision at issue is Section 3009 of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. § 6929, which provides, in pertinent part: "Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by [federal hazardous-waste] regulations." Other pertinent statutory and regulatory provisions are set out in the appendix to this petition. Pet. App. 23a-65a.

STATEMENT

This case involves one locality's effort to shift to other localities a waste problem created as a result of industrial activity within its jurisdiction. Petitioner Upjohn produced a large pile of solid waste as a byproduct of chemical manufacturing in North Haven, Connecticut, before 1985. The pile contains material classified as hazardous waste under the Resource Conservation and Recovery Act (RCRA). 42 U.S.C. § 6901 *et seq.* The zoning officials of North Haven, who are respondents here, directed Upjohn to remove the waste pile from the Town. They took that position even as the federal Environmental Protection Agency (EPA), pursuant to RCRA, was in the process of considering and eventually approving Upjohn's proposal to "close" the waste pile on the site. Without any finding that the EPA-approved closure plan is unsafe, the district court held that the local ban did not conflict with the federal regulatory scheme, and the court of appeals affirmed. Petitioner challenges that ruling on the ground that federal law preempts this kind of naked effort to export a local waste problem.

A. Federal Legal Framework

In 1976, Congress enacted RCRA based on the finding that the problem of solid waste disposal generally, and of hazardous waste disposal specifically, had "become a matter national in scope and in concern" necessitating federal action to fill regulatory gaps left by recently enacted laws directed at reducing air and water pollution. 42 U.S.C. § 6901(a)(4), (b)(3). The centerpiece of RCRA is Subtitle C, which creates a "cradle-to-grave" regulatory system to ensure that hazardous wastes—generally to be identified and listed by the EPA—are safely managed from generation through transportation through final treatment, storage, and disposal. 42 U.S.C. § 6921 *et seq.* The fundamental aim of the system is to guarantee that hazardous waste will come to rest in disposal facilities that have permits for operation, closure, and post-closure monitoring (42 U.S.C. § 6925) and that comply with detailed regulatory standards (42 U.S.C. § 6924; 40 C.F.R. Parts 264, 265). Those standards are designed to "minimize the present and future threat to human health and the environment." 42 U.S.C. § 6902(b) (declaring national policy).[1]

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[1] Section 6925 requires any operator or owner of a treatment, storage, or disposal facility to obtain a permit, and Section 6924 provides for substantive standards that apply to such a facility. 42 U.S.C. §§ 6924, 6925(a) and (c). Recognizing that the development of regulatory standards and the processing of permit applications would take time, Congress provided that, upon fulfillment of certain conditions, an owner or operator would be entitled to automatic issuance of an "interim status" permit while its application for a permanent permit was under review. 42 U.S.C. § 6925(e). EPA's principal regulatory standards for treatment, storage, and disposal facilities seeking final permits are contained in 40 C.F.R. Part 264. The principal standards for the many facilities that are in interim status are contained in 40 C.F.R. Part 265.

Although Congress in 1984 added detailed substantive requirements to Section 6924, some of which concern waste disposal on land, those requirements are generally inapplicable to facilities, like Upjohn's, that no longer accepted wastes after 1985. Accordingly, the

In carrying out its responsibility to ensure the existence of adequate disposal facilities, the EPA has provided that an owner of such a facility must have a plan describing the manner and financing of its eventual closure and must submit that plan for approval when the time for closure arrives. 40 C.F.R. §§ 265.112(a) and (d), 265.140-.150. Public notice is to be given and public comments received, with a hearing to be held if necessary. 40 C.F.R. § 265.112(d)(4); *see also* 42 U.S.C. § 6974(b) (requiring notice to local government and opportunity for public hearing before issuance of permit). The EPA may not approve the closure plan unless it meets specific requirements for particular types of facilities, such as landfills (40 C.F.R. §§ 265.300-.316 (subpart N)), as well as the generally applicable condition that the closure plan minimize the post-closure escape of hazardous substances "to the extent necessary to protect human health and the environment" (40 C.F.R. § 265.111(b)). Upon approval, the closure plan must be executed, in whole or in relevant part, within 180 days (absent an extension). 40 C.F.R. § 265.113(b).[2]

Congress recognized a role for States in the regulation of hazardous wastes. RCRA provides that the EPA Administrator may authorize a State to administer a hazardous waste program "in lieu of the Federal program" (*e.g.*, issuing and enforcing the required permits) but only if the state program is, *inter alia*, "equivalent to" and "consistent with" the federal program. 42 U.S.C. § 6926(b). The statute also provides, with respect to EPA hazardous waste regulations, that "[n]othing in this chapter [42 U.S.C. §§ 6901-6992k] shall be con-

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substantive standards relevant to this case are those established by the EPA.

[2] Although the regulations cited in the text are those applicable to facilities in interim status, the regulations applicable to facilities with permanent permits (40 C.F.R. Part 264) are identical in all material respects.

strued to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations." 42 U.S.C. § 6929.

B. Factual Background

1. *The Closure Plan.* Petitioner Upjohn, a producer of pharmaceuticals, agricultural products, and synthetic organic chemicals, acquired a chemical manufacturing plant in North Haven, Connecticut, in 1962, and operated the plant as expressly allowed by the Town's zoning regulations. Pet. App. 5a; Joint Appendix in Court of Appeals ("JA") 501-02. The North Haven facility has always included a system—modified over the years with the involvement of the Connecticut Department of Environmental Protection (DEP)—to treat wastewater generated as a part of the manufacturing process. JA 196-200. The system, as it evolved, included lagoons and tanks to hold the wastewater while it was biologically treated and while solids in the water settled. JA 98-101, 107-11, 113, 224. Beginning in 1973, the settled solid waste (sludge) was placed in a pile located on the Upjohn site near the lagoons. JA 100-102, 502. Upjohn stopped adding waste to the sludge pile in April 1985 and, at about the same time, altered its treatment system to reduce by 90 percent the quantity of sludge produced. This case concerns the sludge pile, which covers four acres and is contained by sloping earthen sidewalls holding roughly 83,000 cubic yards of material. Pet. App. 5a-6a.

The pile contains certain materials whose properties render the sludge hazardous waste under RCRA. 42 U.S.C. §§ 6921, 6924(d) and (e); 40 C.F.R. § 261.31. In early 1986, after ceasing all disposal of wastes in the sludge pile, Upjohn submitted to the EPA and the Connecticut DEP a plan for closing the pile on the site, having corresponded with both agencies on the matter for the

preceding five years. JA 202-08, 211-16, 332-34.[3] Developed by an environmental engineering firm with substantial experience in preparing closure plans for hazardous waste disposal facilities, Upjohn's plan was revised several times while under agency review, based on comments submitted by respondent North Haven Planning and Zoning Commission and others, both in writing and at a public hearing held by the EPA and DEP. JA 390-91, 400-01, 504, 592. Under the final version of the closure plan, a temporary "cap" consisting of an impermeable barrier, clay, and soil would be placed on the pile, and groundwater would be collected and treated to minimize any release of chemicals; then, after the pile had adequately settled and stabilized, a permanent cap of impermeable material and topsoil would be placed on the pile, and groundwater collection, treatment, and monitoring would continue for 30 years (unless approval is granted to cease earlier). JA 393-96.

The EPA and DEP jointly approved the closure plan on September 29, 1989, thereby obligating Upjohn to carry out the initial phase of the plan by March 29, 1990. JA 505, 655-56. In the approval decision, the EPA and DEP found that the plan complies with applicable regulations, including specific requirements for landfills and the basic federal requirement that the closure plan control, minimize, or eliminate the escape of hazardous materials "to the extent necessary to protect human health and the environment." 40 C.F.R. § 265.111(b). *See* J.A. 655-56.[4]

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[3] The Upjohn waste site has an interim-status permit and therefore came under the interim-status regulatory standards. At the time of the closure plan's submission and eventual approval, the Connecticut DEP had not been authorized by the EPA to administer the RCRA regulatory scheme. Because Connecticut had its own regulatory statute, however, the closure-approval process in this case was carried out by the EPA and DEP jointly.

[4] The EPA/DEP letter noted that the approval "does not relieve the facility of the obligation to obtain any other authorizations as

2. *The North Haven Ban.* While the federal and state environmental authorities were examining and approving Upjohn's closure plan, respondents implemented their determination, arrived at some years earlier, to force Upjohn simply to rid the Town of the sludge pile. On February 14, 1983, the Town zoning authorities had taken two steps to get rid of the waste disposal problem associated with the industrial activity that the Town had long permitted. First, the Commission enacted the present version of Section 3.27.2.24 of the Zoning Regulations, which makes explicit what, according to the Town, was implicit in the prior zoning ordinances: that outside storage of waste products or material is prohibited without express approval of the Commission. JA 552, 688. *See* Pet. App. 19a, 65a. Second, the Commission ordered Upjohn to submit a plan for the eventual removal of the waste pile, including the requirement as a condition of approving certain permits for improvements in other facilities on the site. JA 559-60.

The Town's commitment to elimination of the waste pile was made concrete in May 1986, shortly after Upjohn submitted its initial closure proposal to the EPA and DEP. At that time, the Town Zoning Enforcement Officer, whose successor is respondent Scott Schatzlein, issued a cease and desist order to Upjohn, forbidding it to continue maintaining the pile. JA 503 (stipulated facts). Although the order refers to the condition imposed on February 14, 1983 (J.A. 500, 560), it has been defended as resting on the Town's position that maintenance of the pile is a zoning violation. Thus, in upholding the order, the Connecticut Superior Court recently accepted the Town's argument that (a) Section 6.1 of North Haven's zoning regulations has long prohibited any land use in an industrial zone that is not expressly allowed and is not

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may be required by other provisions of the Connecticut General Statutes, Regulations of Connecticut State Agencies, Code of Federal Regulations, or Federal Statutes." JA 656.

an "accessory" use related to a permitted use, and (b) the waste pile, although not challenged by the Town until 1983, had never been expressly allowed and was not an accessory use. *Upjohn Co. v. North Haven Planning & Zoning Comm'n*, Nos. CV-89-0250632-S, CV-89-0280709-S, CV-89-0284413-S, slip op. at 15-21 (Conn. Super. Ct., Jud. Dist. of New Haven Feb. 21, 1991).[5]

In January 1989, respondent Commission explicitly affirmed the same policy, demanding that the waste pile be removed from the Town. It did so in denying applications filed by Upjohn that sought permission to install improvements to its wastewater treatment system ordered by the state DEP. JA 227-28, 626. The parties here have stipulated that the Commission denied the applications solely because of its view that the pile is in

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[5] As we have noted in the text, respondents have always defended both the cease and desist order and the 1983 condition, in the court of appeals and district court below as well as in the state court actions, as resting on the alleged prohibition of the waste pile by North Haven's zoning regulations (Section 3.27.2.24 as amended in 1983 and the pre-existing Section 6.1). *See, e.g.*, C.A. Br. of Plaintiffs-Appellees at 32 ("the basis for the order was Upjohn's violation of the zoning regulations" and "the issue raised in the state court appeal was the same as that raised in this case"); Plaintiffs' Post-Trial Mem. at 14-28 (D. Conn.); Preliminary Brief for the Zoning Board of Appeals of the Town of North Haven, in *Upjohn Co. v. Zoning Bd. of Appeals*, No. CV-86-0250632-S, at 21-30 (Conn. Super. Ct., Jud. Dist. of New Haven April 6, 1987) (arguing that pre-1983 zoning regulations prohibited the waste pile). The Connecticut Superior Court took the same view when it found it necessary to reach and resolve the issue whether the waste pile was a zoning violation before (and after) 1983, deciding that it was. *Upjohn Co. v. North Haven Planning & Zoning Comm'n, supra*, slip op. at 15-18. *See also id.* at 23 ("commission cannot require the applicant to meet standards not contained in the regulations"); *id.* at 29 (refusing to discuss another issue because it had been made academic by remainder of court's ruling).

Ten copies of the recent Superior Court decision have been lodged with the Clerk of the Court.

violation of the Town's zoning regulations. JA 505 (stipulated facts).[6]

Throughout this extended dispute, including the period after federal and state approval of Upjohn's closure plan, the Town has thus relied upon its zoning power as the justification for its efforts to force removal of the sludge pile. At no point has either of the respondents made any specific findings that the closure plan approved by the EPA and DEP is unsafe or that only elimination of the waste pile would adequately protect human health and the environment, in North Haven alone or generally. At the same time, it has remained undisputed that respondents' insistence on removal of the waste pile from the Town would impose enormous additional costs on Upjohn (and, perhaps, on other localities to which the waste would be moved). The district court noted that the EPA/DEP-approved closure plan was estimated in 1986 to cost approximately $1 million. Pet. App. 6a. By contrast, removal was estimated in 1986 to cost between 20 and 40 times the $1 million needed for closure, depending on the available means of removal. Pet. App. 6a. The cost of removal has grown substantially, both in absolute terms and relative to the cost of on-site closure, since 1986.[7]

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[6] The state trial court has recently held that the Commission could not lawfully base its denial of permission to improve the wastewater treatment facility on an alleged violation at the waste pile located elsewhere on Upjohn's site. *Upjohn Co. v. North Haven Planning & Zoning Comm'n, supra*, slip op. at 21-28. Although the Commission's implementation of its position through denial of the requested application has been set aside, the position itself has not been abandoned.

[7] If land disposal were the chosen alternative, thousands of truckloads would have to be shipped great distances, because neither Connecticut nor any other nearby State currently has an adequate land disposal site. During the excavation and move, the pile would be exposed to rainwater and snow that would increase the leaching of materials into groundwater. As an alternative to land disposal, incineration would be more expensive and likely require substantial

C. Proceedings Below

1. *District Court Proceedings.* Three weeks after Upjohn received federal and state approval for its closure plan, and after it had begun the initial capping of the waste pile, respondents filed suit in Connecticut Superior Court, claiming that Upjohn's implementation of the closure plan would violate North Haven's zoning regulations and asking for a preliminary and permanent injunction that would forbid Upjohn to implement the closure plan and require Upjohn to remove the pile. *See* JA 11. Upjohn, which is headquartered in Michigan, removed the case to federal court pursuant to 28 U.S.C. § 1441. Upjohn contended that the zoning regulations did not require removal and, in any event, that respondents' direction to remove the pile was preempted by RCRA and by the EPA approval of the closure plan. Upjohn counterclaimed for an injunction against respondents' order to remove the pile. JA 13-24.

After trial, the district court ruled in favor of respondents on the federal issue and enjoined implementation of the closure plan.[8] Pet. App. 4a-21a. As an initial matter, the court abstained from deciding whether the Town's zoning regulations do in fact require removal of the waste pile, instead assuming that they do. Pet. App. 11a. Proceeding on that assumption, the court then held that the regulatory prohibition is not preempted by federal law.[9]

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movement of the pile anyway, for there is no incineration facility nearby; incineration also would probably result in increased air pollution. Chemical fixation of the material may not be possible and might require removal in any event.

[8] The trial was consolidated with the hearing on the application for a preliminary injunction. Although respondents had applied for a temporary restraining order, that request was denied. Pet. App. 4a-5a. The temporary capping of the waste pile, as called for by the initial phase of the closure plan, was completed by the time that the district court ruled on May 31, 1990.

[9] The district court also abstained from deciding whether the Town's position was inconsistent with state law. Pet. App. 12a. In reaching the question whether the assumed local requirement of

The court reasoned that application of the Town's ban on outdoor waste storage (Zoning Regulation § 3.27.2.24) to Upjohn's facility was authorized by the RCRA "savings" clause, which disclaims preemption of "any requirements, including those for site selection, which are more stringent than those imposed by [EPA] regulations" under RCRA. 42 U.S.C. § 6929. The court recognized that both the Eighth Circuit and a federal district court had held local bans on disposal facilities to be outside the scope of the savings clause and inconsistent with RCRA's aim of ensuring adequate safe disposal capacity. *See ENSCO, Inc. v. Dumas*, 807 F.2d 743 (8th Cir. 1986); *Ogden Envtl. Servs. v. City of San Diego*, 687 F. Supp. 1436 (S.D. Cal. 1988). The district court here distinguished those decisions, however, on the ground that the ban in this case was not adopted after, or in response to, a specific federal approval of a waste-disposal project. Pet. App. 19a-20a. The court also relied on the fact that the Town's ban allows for the possibility of exemptions, although the court made no findings as to the basis for not extending an exemption to Upjohn. *Id.* at 20a-21a. Finally, the court observed that the EPA/DEP letter approving Upjohn's closure plan stated that Upjohn was not thereby being relieved from obtaining any further authorizations required by Connecticut General Statutes. *Id.* at 21a.

2. *The Court of Appeals Decision.* The court of appeals affirmed, agreeing that the Town's ban was con-

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removal was federally preempted, the court initially suggested that petitioner was at least required to *apply* for a permit to implement its closure plan. *Id.* at 13a-14a. As respondents later explained to the court of appeals, however, the district court's preemption ruling was "not dependent on whether or not Upjohn had applied for the permits." Plaintiffs-Appellees' Memorandum of Law in Opposition to Defendant-Appellant the Upjohn Company's Motion for Stay of Appeal at 5-6. Upjohn did subsequently apply for permits, which the Commission denied precisely because of the alleged zoning violation. *Ibid.*

sistent with federal law. Pet. App. 1a-3a. First, the court, like the district court, pointed to the RCRA savings clause, which allows local governments to impose "more stringent" regulations. Next, it noted the sentence in the EPA/DEP approval letter that disclaimed preemption of any obligation Upjohn had to obtain authorizations "required" by "the Connecticut General Statutes," state agency regulations, or federal statutes or regulations (*see* note 4, *supra*); the court observed that local zoning codes are "authorized" by the Connecticut General Statutes (in §§ 8-1 and 8-2). Pet. App. 2a. Then, the court said that the EPA and DEP had "responded to public comments and questions by stating that if the Connecticut courts upheld a ruling that Upjohn's current plan would violate zoning regulations, Upjohn would have to submit to EPA and DEP a new plan for review and approval." Pet. App. 2a-3a.[10] Against this background, the court of appeals, without further analysis, rejected the preemption argument "substantially for the reasons stated in the Memorandum of Decision of Judge Daly dated May 31, 1990, published at [753] F. Supp. [423] (1990)." Pet. App. 3a.

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[10] The court had in mind the following passage from the State DEP's summary of public comments and responses, issued in April 1989 (JA 603):

> *Public Comment*
>
> Will DEP/EPA require Upjohn to submit, along with its pending application for a closure/post-closure plan, a plan indicating how they would remove the sludge pile in the event the pending North Haven Planning and Zoning court action so required?
>
> *DEP/EPA Response*
>
> No. If the final determination from the court upholds the complaint filed by the Planning and Zoning Commission, Upjohn would have to submit a waste removal closure/post-closure plan to DEP/EPA for review and approval.

REASONS FOR GRANTING THE PETITION

The Second Circuit has held that a local veto of a plan to dispose of hazardous waste—a veto made without any articulated and well-supported environmental basis and in the face of an EPA finding that the disposal plan adequately protects human health and the environment—is consistent with federal law. That view, which allows a municipality to garner the benefits of industrial activity without sharing the costs, is incorrect. Not surprisingly, it is also in conflict with the view taken by other federal courts, including the Eighth Circuit. *See, e.g., ENSCO, Inc. v. Dumas*, 807 F.2d 743 (8th Cir. 1986); *Ogden Envtl. Servs. v. City of San Diego*, 687 F. Supp. 1436 (S.D. Cal. 1988).

The federal scheme embodied in RCRA establishes a national policy aimed at solving the national problem of providing adequate facilities for the safe disposal of hazardous wastes. Although RCRA permits localities to serve that policy by imposing "more stringent" requirements on disposal facilities (42 U.S.C. § 6929), it does not allow a locality to wall itself off from the solution by simply banning a disposal facility within its borders, with the inevitable effect that some other jurisdiction will be burdened with the problem. However attractive that sort of exclusionary policy might appear from a purely local point of view, it is *not* "more stringent" than federal requirements, for it is no more protective of the environment, considered from the necessary national perspective. Indeed, Congress has recognized that the sort of "not in my back yard" (NIMBY) syndrome that was at work in this case, if allowed to prevail, would undermine the RCRA policy of ensuring safe disposal of hazardous wastes. *See* pages 15-16, *infra*.

The Second Circuit was thus mistaken in concluding that federal law allows a local community's effort to export its hazardous-waste problem to other communities when a local solution has already been found safe by fed-

eral authorities. Other federal courts have rejected that approach and recognized the invalidity of such near-sighted efforts, holding them preempted by RCRA and other statutes. *See, e.g., ENSCO, Inc. v. Dumas, supra*; *Ogden Envtl. Servs. v. City of San Diego, supra.* If the Second Circuit's decision stands, however, local communities will be encouraged to follow North Haven's lead and ban local hazardous-waste disposal within their borders. The federal regulatory scheme cannot function, and the environment will suffer, if localities are permitted to disclaim their share of the national responsibility for safe disposal.[11]

I. RESPONDENTS' BAN OF A LOCAL HAZARDOUS WASTE DISPOSAL FACILITY IS INCONSISTENT WITH RCRA.

A. The Federal Policy

A local ban on a hazardous-waste disposal facility, without any finding that the facility must be removed for environmental safety, is contrary to the federal scheme established by RCRA. As such, it is preempted by federal law. *See, e.g., Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 109 S. Ct. 1262, 1273 (1989); *International Paper Co. v. Ouellette*, 479 U.S. 481, 491-92 (1987); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

It is, to begin with, unmistakable that Congress regarded the problem of hazardous waste to be a national problem, not one to be left to the initiative of state and local governments. To bring about a national solution, Congress sought in RCRA to ensure the safe disposal of

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[11] Protectionist efforts to avoid responsibility for waste disposal have become a national problem. *See* Weisskopf, *Carolinas' Clash Over Toxic Waste: Sign of a Nationwide Problem*, Wash. Post, March 18, 1991, p. A7 (describing "new kind of civil war" between "states that have incinerators and landfills to handle their wastes" and "'have not' states that have dodged the politically sticky task of siting hazardous waste facilities at home").

hazardous wastes by guaranteeing the development of a sufficient number of adequate disposal facilities. *See American Mining Congress v. EPA*, 824 F.2d 1177, 1179 (D.C. Cir. 1987) (Congress's " 'overriding concern' " was to create "a national system to insure the safe management of hazardous waste") (citation omitted). That guarantee is a logical prerequisite to the functioning of the entire "cradle-to-grave" management system, which depends on the existence of safe final resting places—disposal facilities—for the hazardous waste that is an inevitable byproduct of industrial and other human activity. A local ban that lacks a particularized environmental justification is manifestly inconsistent with that congressional goal: there would be no disposal at all if every jurisdiction adopted a comparable policy.

Congress, in fact, has taken specific notice of the tension between the national commitment to adequate disposal facilities embodied in RCRA and the tendency of local communities to favor their placement elsewhere. Thus, in a 1986 amendment to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, Congress resorted to the financial leverage of Superfund money to pursue the RCRA goal.[12] As the Senate Committee explained, the RCRA goal was not being met with existing tools because the "not in my back yard" (NIMBY) syndrome leads to parochial protectionism; the tendency of local governments to fall prey to the syndrome, said the Committee, undermines the national policy of RCRA:

> Pressures from local citizens place the political system in an extremely vulnerable position. Local officials have to respond to the fears of local citizens.

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[12] In Section 104(c)(9) of CERCLA, Congress declared that no Superfund money may be spent for remedial actions in any State that does not ensure, in its own borders or through contracts with other States, enough disposal capacity meeting RCRA standards to handle the hazardous waste generated in that State for the next 20 years. 42 U.S.C. § 9604(c)(9).

> The broader social need for safe hazardous waste management facilities often has not been strongly represented in the siting process. A common result has been that facilities have not been sited, and there has been no significant increase in hazardous waste capacity over the past several years.
>
> In 1976, the Resource Conservation and Recovery Act (RCRA) was passed, mandating the construction of needed hazardous waste facilities and placing the responsibility for siting the facilities with the States.
>
> Unfortunately, when RCRA was first passed, Congress failed to anticipate the intensity of public opposition to new and expanded waste management facilities. While everyone wants hazardous waste managed safely, hardly anyone wishes it managed near them. This is the NIMBY syndrome (not in my backyard). Yet if the RCRA and Superfund programs are to work—if public health and the environment are to be protected—the necessary sites must be made available.

S. Rep. No. 11, 99th Cong., 1st Sess. 22-23 (1985). To achieve that end, Congress used its Superfund leverage as one device "to force States to provide safe and adequate facilities for toxic and hazardous waste." 132 Cong. Rec. 28,436 (1986) (remarks of Sen. Chafee).[13]

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[13] A similar form of protectionism, based on the same NIMBY principle, has been condemned by the United States government in the context of supporting a Commerce Clause challenge to local measures designed to keep hazardous waste from coming into a State. Brief for the United States as *Amicus Curiae* in *National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management*, 910 F.2d 713 (No. 90-7047, 11th Cir. 1990), *modified in other respects*, 1991 U.S. App. Lexis 1813, at 2 ("While most would agree that adequate capacity for safe disposal of hazardous waste is important to the nation's health and welfare, individual states and localities are likely to succumb to the 'not in my backyard' (NIMBY) arguments of their constituents . . . .").

The United States noted in the same brief (at 15) that this Court in *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624

The EPA likewise has explicitly and formally recognized that the national policy of RCRA is not compatible with efforts by one part of the country to declare itself exempt from the solution to the hazardous-waste problem. Thus, in its regulation discussing the circumstances in which a state hazardous-waste program is to be regarded as not "consistent" with the federal program, EPA has stated: "Any aspect of State law or of the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State may be deemed inconsistent." 40 C.F.R. § 271.4 (b).[14] The agency comment upon issuance of the regulation further clarified that point: "State programs which contain provisions that prohibit treatment, storage or disposal of hazardous waste within the State, *will* be deemed inconsistent if the prohibition has no basis in human health or environmental protection." 45 Fed. Reg. 33,395 (1980) (emphasis added).[15] If a state program is not

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(1978), held "that states may not place the burden of protecting their resources or economy on other states." That is the effect not only of a ban on imports but also of a ban on keeping in a community hazardous waste that is already there, having been generated by local industrial activity that has long benefited the community. In terms of RCRA policy, if not of Commerce Clause law, such a ban is just as destructive as, and indeed more irresponsible than, a local effort to seal itself off from waste created outside its own jurisdiction.

[14] The EPA has said that the regulation reflects its construction not only of the state authorization provision, 42 U.S.C. § 6926, but of the statutory savings clause as well, 42 U.S.C. § 6929. Brief for Respondents William Reilly and EPA in *Hazardous Waste Treatment Council v. Reilly*, No. 90-1433 (D.C. Cir., filed Feb. 19, 1991), at 10, 34-35.

[15] The first part of the regulation reflects the same principle, declaring that any state measure that "unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent." 40 C.F.R. § 271.4(a).

consistent with federal policy when it operates as a ban without environmental justification, a local government measure with the same effect and same lack of particularized environmental justification is every bit as inconsistent with federal policy.[16]

B. The Ban at Issue Here

The court of appeals, like the district court before it, gave short shrift to concerns about national policy, finding instead that Congress had allowed local communities to require removal of hazardous waste pursuant to the "savings clause" contained in 42 U.S.C. § 6929. But that reading would turn a provision allowing more rigorous *assumption* of environmental responsibilities into one allowing wholesale *avoidance* of environmental responsibilities—just the opposite of what Congress had in mind.

The plain fact is that a ban on a hazardous waste facility, without a particularized environmental basis, is not saved by the savings clause.[17] *See ENSCO, Inc. v.*

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[16] EPA also expressed its view of the national responsibility for hazardous waste disposal in addressing local opposition to disposal of polychlorinated biphenyls (PCBs), which are regulated by the Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.*:

> EPA has become concerned that actions by local and State governments to prohibit disposal of PCBs and other substances in their jurisdictions could frustrate the national goal of properly disposing of hazardous chemical substances. While EPA has always believed that States should have the right to set pollution control standards more restrictive than the Federal standards, it would be a matter of national concern if this principle were to become the basis for refusal by States to share in the national responsibility for finding safe means for the proper disposal of hazardous substances.

44 Fed. Reg. 31,528 (1979). Although the statutory contexts are concededly different, those comments are equally applicable to hazardous waste regulated by RCRA.

[17] The legislative history of the savings clause itself is unenlightening. The clause was added to the statute in 1980. Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, § 14,

Dumas, supra; *Ogden Envtl. Servs. v. City of San Diego, supra* (both discussed at pages 23-24, *infra*). Such a ban is not "more stringent" in the sense used by RCRA, for it is not more protective of human health and the environment overall. A *local* ban does nothing to reduce the nationwide risks to health and the environment that RCRA seeks to eliminate. At best, it merely moves those risks from one place to another. At worst, it increases environmental harm overall by requiring resort to other solutions that may be more damaging to the environment.[18] And unlike a soundly based, stricter environmental standard, a simple ban, if adopted nationally, would effectively prevent safe disposal in the United States.

To put the same point another way, it seems evident from the statutory scheme as a whole that a local requirement cannot be regarded as "more stringent" than the federal program—and thus free from preemption—if it is not "consistent" with the federal program. The difference is simply that between supplemental regulation and contradictory regulation. Here, as we have said, the very essence of the federal program is to promote a universally shared responsibility for the development of adequate disposal facilities. An environmentally unjustified *local* ban is not consistent with that program, any more

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94 Stat. 2342. It was added to the bill as an amendment on the floor of the Senate, with essentially no comment on its meaning or scope. 125 Cong. Rec. 13,247-50 (1979). No similar provision appeared in the House bill, and the Conference Committee adopted the provision without elaboration. H.R. Conf. Rep. No. 1444, 96th Cong., 2d Sess. 41-42 (1980).

[18] For example, transportation itself may be harmful, and alternatives like incineration may cause other forms of pollution. Such alternatives have been of specific concern to Congress and the EPA. *See, e.g.*, 42 U.S.C. §§ 6924(n), 6925(g); H.R. Rep. No. 198, Part I, 98th Cong., 1st Sess. 39 (1983); 48 Fed. Reg. 14,481-82 (1983). More generally, Congress enacted RCRA to coordinate with, not obstruct, other pollution laws, so as to reduce overall environmental risks. 42 U.S.C. § 6905; H.R. Rep. No. 1491, Part I, 94th Cong., 2d Sess. 4 (1976).

than is a *state* hazardous-waste program that operates as a ban and lacks particularized environmental justification. *See* 40 C.F.R. § 271.4 (reflecting EPA's view of the savings clause); page 17 & n.14, *supra*.[19]

This is not to say that a local ban could *never* be a "more stringent" regulation within the meaning of the savings clause.[20] The existence of special local conditions could conceivably make a local ban of a given waste site more stringent in the proper environmental sense. At a minimum, however, the regulating entity must come forward with a particularized basis for holding that disposal cannot be safely carried out within the jurisdiction, especially in the face of a particularized EPA decision that removal of a particular waste facility is *not* necessary for safety. Absent such a basis, a local ban must be deemed preempted, given the obvious danger that improper NIMBY motives, rather than sound safety considerations, lie behind the local decision. There is no such environmental basis for the ban in this case.[21]

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[19] Although this Court has recognized a "presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause" (*Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985)), that presumption drops out of the analysis when a local measure—of the sort likely to be motivated by a protectionist, NIMBY principle—is not found to be grounded in health or safety considerations, other than perhaps a general desire to see some other community deal with the disposal of hazardous wastes.

[20] Nor is it to say that a locality might not prohibit the placement of a waste facility in particular areas within its borders—for example, in residential neighborhoods. Here, of course, the waste pile at issue is located in an industrial zone, and North Haven has ordered its removal from the entire Town.

[21] The effects of the present ban are particularly obnoxious to federal policy because of the enormous costs imposed on an existing facility. Congress has made clear its determination that extraordinary care be taken before such costs are imposed in requiring modification of existing facilities, even if higher costs might be justified in regulating the construction of new facilities. *See, e.g.*,

The district court also sought to save the North Haven ban on the ground that the Town's regulations allow the Commission to permit some waste-storage facilities. Pet. App. 19a (describing Section 3.27.2.24). But even the cited regulation fails to specify the circumstances in which an exemption will be granted; without laying down any standard for decision, it merely identifies a handful of factors to be considered in reaching a decision, including one consideration—"aesthetics"—unrelated to human or environmental safety. *See* Pet. App. 65a (quoting regulation). In any event, reliance on the facial terms of the Town's regulations is beside the point in the absence of any finding that the Town based its refusal to allow *Upjohn*'s facility on sound environmental concerns.[22] A written provision for exemptions from the ban, even one that identifies the factors to be considered in granting or denying exemptions, is legally meaningless unless the locality demonstrates that the proper factors, rather than local parochialism, actually lay behind a particular re-

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42 U.S.C. §§ 6924(a) (directing EPA to make appropriate distinctions between existing and new facilities), 6924(b)-(h) (applying new restrictions on particular disposal means only to still-open facilities). Concern with costs is also a major theme of the regulatory scheme, which requires careful financial planning for closure and post-closure maintenance, because of the danger that high costs might bankrupt a responsible party and, perhaps, leave a clean-up problem to the public. *See, e.g.*, 40 C.F.R. § 265.140-.150 (subpart H: financial requirements); EPA, Background Document: Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities Under RCRA at 61, 70, 71 (1980); 51 Fed. Reg. 16,424-25 (1986) (modifying language of proposed closure standard to reflect comments complaining that proposed standard would require actions that "were not cost-effective").

[22] There can be little doubt that the ban in this case is, in fact, a ban. The Town has never suggested that Upjohn's pile poses problems unique to its site or that other action, short of removal from the Town itself, would satisfy specific environmental concerns. Indeed, when Upjohn applied for permission to close the pile on the site, the application was summarily denied. *See* note 9, *supra*.

fusal to grant an exemption. An unjustified as-applied ban is no different, for present purposes, from an unjustified facial ban on disposal of particular wastes.

The ban at issue in this case was approved by the courts below without any finding, or basis for finding, that it has an environmental foundation. In particular, there has been no finding that removal of the waste pile is required for safety reasons or that the closure plan approved by the EPA is, contrary to EPA's determination, not actually protective of human health and the environment. *See* 40 C.F.R. § 265.111(b). The ban in this case was upheld by the court of appeals and the district court on the broad theory that no such basis is required—that North Haven could ban Upjohn's waste pile even without any environmental reason. That proposition is inconsistent with the RCRA scheme.[23]

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[23] The court of appeals suggested in passing that the EPA—in a sentence in the letter approving Upjohn's closure plan and in a response to a public comment—might have saved North Haven's removal requirement from preemption. But the sentence at issue in the approval letter says only that the approval itself does not preempt certain other obligations, not that otherwise-preempted obligations are thereby preserved. And the sentence conspicuously refers only to an obligation to obtain "authorizations" that are "required" by *state* statutes or *state* agency regulations (or federal statutes and regulation). That category does not include any local government rules that are merely *permitted* by state law, let alone rules that prevent the execution of the closure plan rather than merely authorize the steps needed to execute it. JA 656 (quoted at note 4, *supra*). Similarly, the EPA/DEP response to a public comment (*see* note 10, *supra*), aside from a confusing reference to a nonexistent suit brought by the Commission, says no more than that a *valid* local requirement of removal of the waste pile would require submission of a new closure plan. Nothing the EPA has said in this proceeding alters the conclusion that North Haven's local ban is incompatible with the federal scheme.

Nor, contrary to the district court's apparent belief (Pet. App. 19a-20a), does the timing of respondents' removal decision make it any less incompatible with RCRA.

II. OTHER FEDERAL COURTS, INCLUDING THE EIGHTH CIRCUIT, HAVE RECOGNIZED FEDERAL PREEMPTION OF LOCAL BANS.

The decision below puts the Second Circuit in direct conflict with other federal courts construing RCRA in general and the savings clause in particular. Most particularly, it places the Second Circuit at odds with the Eighth Circuit, which has held that RCRA does preempt a local measure that simply bans the disposal of certain hazardous wastes within its borders, without regard to specific safety concerns. *ENSCO, Inc. v. Dumas*, 807 F.2d 743 (1986). Although the Eighth Circuit recognized that RCRA does not occupy the field of all hazardous waste regulation—just as it does not preempt the broader field of all solid waste regulation (*City of Philadelphia v. New Jersey*, 437 U.S. 617, 620 n.4 (1978))—it nonetheless found the local ban before it to be preempted because it undermined "the purposes and objectives of the RCRA" by walling the locality off from the national problem of safe disposal of hazardous waste. *ENSCO*, 807 F.2d at 744-45. The court explained: "RCRA emphasizes the need for safe disposal and treatment of hazardous waste," yet the local ban "ignores that [the particular] wastes do exist, and through its ban on storage, treatment, and disposal in essence mandates that these wastes in [the locality] will not be handled in the manner deemed safest by Congress and the EPA." *Id.* at 745. The Eighth Circuit explicitly held that the local ban was not protected by the savings clause in RCRA, which "acknowledges only the authority of state and local governmental entities to make good-faith adaptations of federal policy to local conditions," not to insist that other communities handle the hazardous-waste problem. *Ibid.*

The district court in *Ogden Envtl. Servs. v. City of San Diego*, 687 F. Supp. 1436 (S.D. Cal. 1988), reached a similar conclusion, expressly following the Eighth Circuit's decision and holding that RCRA preempted a local government's refusal to permit a hazardous-waste dis-

posal facility (an incinerator) that had received a federal permit under RCRA, 42 U.S.C. § 6925. Acknowledging that the RCRA savings clause contemplates a role for state and local regulation (687 F. Supp. at 1444), and that a local government might even require land-use permits in proper circumstances (*id.* at 1445), the court nevertheless ruled, based on *ENSCO*, that the savings clause "only provides for more stringent requirements than those imposed by the federal government, not outright bans on such activity" (687 F. Supp. at 1446). The court went on to conclude that the local refusal to permit the disposal facility effectively constituted a ban, because (like the ban at issue here) it was unsupported by any articulated, particularized environmental or health and safety concerns (and the EPA had decided to permit the facility as acceptably safe). *Id.* at 1446-48.[24]

The Fifth Circuit, in a related though not identical statutory context, has likewise refused to allow a local government to frustrate federal regulation of waste disposal. In *Rollins Envtl. Servs. (FS), Inc. v. Parish of St. James*, 775 F.2d 627 (5th Cir. 1985), which involved

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[24] The Eleventh Circuit in *National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management*, 910 F.2d 713 (1990), *modified in other respects*, 1991 U.S. App. Lexis 1813, held that RCRA preempted a State's ban on land disposal of certain hazardous wastes, even though Congress had, in 1984, adopted a broad policy against land disposal. The court concluded that the land disposal provisions of RCRA (42 U.S.C. § 6924(d)-(m)) were designed implicitly to give EPA the sole authority to delay the application of the ban to particular wastes in light of a national determination of the unavailability of alternative disposal facilities; and that, where EPA had granted such an extension for certain wastes, a State could not adopt a ban for such wastes without violating RCRA. 910 F.2d at 724. In making clear the need for a national determination of adequate disposal capacity, the court cited Congress's policy of resisting the NIMBY syndrome and the interaction of the RCRA and CERCLA policies encouraging the development of adequate disposal capacity. 910 F.2d at 716. Those policies apply with extra force where, as here, the waste site is not even subject on its face to the congressional bar on land disposal.

the Toxic Substances Control Act (TOSCA), 15 U.S.C. § 2601 *et seq.*, the court concluded that, even beyond the specific TOSCA preemption provision, the TOSCA program was designed to ensure safe disposal of certain hazardous chemicals (775 F.2d at 632-33) and that a local measure effectively banning local disposal would impair that program. The court explained: "No one wants a toxic waste disposal facility 'in his own back yard,'" yet "[i]f every locality were able to dodge responsibility for and participation in this program through artfully designed ordinances, the national goal of safe, environmentally sound toxic waste disposal would surely be frustrated." 775 F.2d at 637. The same conclusion applies in this case.

No court, to our knowledge, has upheld a local ban of the sort at issue here. Although a ban of sorts was allowed in *Sharon Steel Corp. v. City of Fairmont*, 334 S.E.2d 616 (W. Va. 1985), *appeal dismissed*, 474 U.S. 1098 (1986), the ruling in that case was quite different from the decisions below upholding the ban imposed by North Haven. In *Sharon Steel*, the West Virginia Supreme Court narrowly construed a local ordinance that banned hazardous waste facilities, holding that it applied only to the extent that a particular facility itself was found unsafe. The court therefore rejected an argument that RCRA preempted the ordinance on its face. *Id.* at 624. The United States, whose views were solicited by this Court, expressly relied on that limiting construction in recommending that this Court deny review. Brief for the United States as *Amicus Curiae*, *Sharon Steel Corp v. City of Fairmont*, No. 85-616, at 3, 5 (filed Dec. 31, 1985). At the same time, however, the United States indicated that "a complete prohibition on placement of hazardous waste sites might in some circumstances conflict with the federal scheme set forth in the Resource Conservation and Recovery Act." *Id.* at 3. Even with the ordinance narrowly construed, three Jus-

tices dissented from the decision of the Court not to hear the case. 474 U.S. 1098 (Justices Brennan, White, and Blackmun dissenting).

In the present case, of course, the courts below approved a local waste-disposal ban without regard to any need for an environmental justification as applied. This case thus squarely presents the question whether such a flat prohibition is consistent with the provisions of RCRA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: March 20, 1991

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 598 August Term, 1990

(Argued: December 10, 1990 Decided: Dec. 14, 1990)

Docket No. 90-7638

NORTH HAVEN PLANNING AND ZONING COMMISSION,
and SCOTT SCHATZLEIN,
Plaintiffs-Appellees,

v.

UPJOHN COMPANY,
Defendant-Appellant.

Before: KEARSE, PIERCE, and MINER, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the District of Connecticut, T.F. Gilroy Daly, *Judge*, enjoining defendant from implementing plans with respect to waste pile until necessary permits obtained from plaintiff commission. *See* —— F. Supp. —— (1990).

Affirmed.

Per Curiam:

Defendant Upjohn Company ("Upjohn") appeals from a final judgment of the United States District Court for the District of Connecticut, T.F. Gilroy Daly, *Judge*, enjoining Upjohn from implementing its present plan for "capping" a 4.25-acre, 40-foot-high pile of chemical waste on its property in the Town of North Haven, Connecticut ("Town"), until such time as Upjohn has obtained the necessary permits from plaintiff North Haven Planning & Zoning Commission. The district court ruled that the Town's zoning regulations were not preempted by the Federal Resource Conservation Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.* (1988), or by prior actions of the United States Environmental Protection Agency ("EPA") and the Connecticut Department of Environmental Protection ("DEP") in approving Upjohn's current plan. On appeal, Upjohn contends principally that the district court erred in concluding that RCRA does not preempt the Town's zoning regulations and in abstaining from deciding, *inter alia*, whether the Town's regulations are in fact violated. We have considered all of Upjohn's arguments on this appeal and have found them to be without merit.

RCRA provides that "[n]othing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by [the] regulations [passed pursuant to this chapter]." 42 U.S.C. § 6929. In addition, the approval given by EPA and DEP to Upjohn's plan to cap its sludge pile stated that the approval did not relieve Upjohn from its obligation "to obtain any other authorizations [that] may be required by other provisions of the Connecticut General Statutes"; local zoning codes are authorized by Conn. Gen. Stat. Ann. §§ 8-1 and 8-2. Consistent with the view that the approval was thus not intended to preempt local zoning regulations, EPA and DEP responded to public comments and questions by stating that if the

Connecticut courts upheld a ruling that Upjohn's current plan would violate zoning regulations, Upjohn would have to submit to EPA and DEP a new plan for review and approval.

Accordingly, we see no error in the rulings of the district court that federal law and regulatory actions have not preempted the Town's zoning regulations. Nor do we see any abuse of discretion in the court's decision to abstain from deciding what are essentially state-law questions. In sum, we affirm the judgment substantially for the reasons stated in the Memorandum of Decision of Judge Daly dated May 31, 1990, published at —— F. Supp. —— (1990).

The judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civ. No. N-89-526 (TFGD)

NORTH HAVEN PLANNING & ZONING COMMISSION
and SCOTT SCHATZLEIN,
Plaintiffs,

v.

THE UPJOHN COMPANY,
Defendant.

MEMORANDUM OF DECISION

[Filed May 31, 1990]

The subject of this litigation is a sludge pile containing hazardous materials located on defendant's property in North Haven, Connecticut. The North Haven Planning and Zoning Commission ("the Commission") and Scott Schatzlein, its present Zoning Enforcement Officer ("plaintiffs") originally filed this action on October 19, 1989 in Superior Court in New Haven, Connecticut, seeking to enjoin the Upjohn Company ("defendant", "Upjohn") from implementing a plan capping the sludge pile and also requiring Upjohn to remove it. Defendant subsequently removed this case to federal court. 28 U.S.C. § 1441. On October 25, 1989, the Honorable José A. Cabranes denied plaintiffs' application for a temporary restraining order. On November 22, 1989, Upjohn answered plaintiffs' amended complaint, and also filed a counterclaim seeking to enjoin plaintiffs from enforcing any local regulations which prohibit Upjohn from imple-

menting its closure plan and new wastewater treatment system. A consolidated hearing on plaintiffs' application for a preliminary injunction and trial on the merits of both parties' claims began on December 4, 1989, and concluded January 10, 1990. Both parties have submitted proposed findings of fact and conclusions of law, and the matter is now ripe for decision.

FINDINGS OF FACT

The Upjohn Company, headquartered in Kalamazoo, Michigan, produces pharmaceuticals, agricultural products, and synthetic organic chemicals. Upjohn's North Haven, Connecticut facility, a medium-sized manufacturing plant, makes synthetic organic chemicals. The North Haven plant is bounded on its eastern side by the Quinnipiac River. Upjohn started production on this site in 1962.

1) THE PILE

A by-product of Upjohn's chemical manufacturing is a substantial quantity of wastewater. In 1968, Upjohn began adding lime to its wastewater so as to neutralize its waste, and channeling the water through a series of lagoons to permit any solids to settle before the water was discharged into the Quinnipiac River. Upjohn has modified these lagoons several times to improve its water treatment system. Upjohn also dredged the solids which had collected in the lagoons and, starting in 1973, began placing this waste material, known as a sludge, on a portion of its property north of a certain lagoon which by that time contained an aeration device. By 1977 the resulting pile, known as the north sludge pile and the subject of this litigation, covered approximately 4.25 acres of Upjohn's property.

Upjohn continued to place sludge on this pile until April, 1985. The pile did not expand any further horizontally, but did grow vertically. By 1985, the pile stood

approximately 40 feet above grade, and contained approximately 83,000 cubic yards of sludge. The pile is surrounded on all sides by a sloping earthen embankment and dikes. The material in the pile consists of, among other compounds, iron, iron oxides, silica, silica oxides, powdered activated carbon, sodium chloride, microorganisms, lead, dichlorobenzidene, dichloronitroauiline, other trace chemicals, and water. The materials in the pile are classified as hazardous waste under the Federal Resource Conservation Recovery Act ("RCRA"). 42 U.S.C. § 6901 *et seq.*

In April, 1985, as a result of adding a substantial amount of material that had not had a sufficient period to dry, the pile partially collapsed, damaging water treatment devices. Upjohn removed approximately 27,000 tons of material that had escaped from the pile, placed it in a temporary storage area, and subsequently took it off site. Some time after this accident, Upjohn implemented a treatment system which reduced the quantity of material being produced by approximately 90 percent. Upjohn stopped placing sludge on the north pile in April, 1985.

Upjohn hired Malcolm Pirnie, Inc. to evaluate the remedial alternatives for addressing the environmental problems posed by the north sludge pile. That firm reported in July, 1986, that carting the sludge away would cost $22,600,000, that incineration and carting would cost $19,700,000, and that chemical fixation and carting would cost $40,500,000. The firm also explained that capping the pile and leaving it in place would cost only $900,000. A similar report prepared in 1982 had estimated the cost of carting the sludge away at $12,000,000, with an additional $500,000 per year thereafter for sludge generated at the production rate at that time. There was testimony at trial that chemical manufacturers around the country utilize one or combinations of several options for on-site disposal of sludge: land piling (such as uti-

lized by the defendant), land fill, land spreading or spraying, and land farming. Other manufacturers have inplemented recycle and reuse programs, and still others incinerate, though this was not popular until the 1980's due to the oil crises of the 1970's. Finally, some companies take their waste off site.

Upjohn chose to cap their pile, provided it could gain approval from the United States Environmental Protection Agency ("EPA"). The plan developed and modified by Malcolm Pirnie provides for capping the pile in two stages, which includes first adding six inches of gravel, and then replacing this layer with 24 inches of vegetated cover soil and a synthetic membrane. Malcolm Pirnie recommended the phased approach in order to more closely monitor the stability of the pile. The final cap will provide for a "higher degree of long-term integrity." Def's exh. 523 at 1-6. Under the plan, the capped pile and subsurface groundwater are to be monitored for hazardous waste leachate for the next thirty years. *Id.*

2) The Regulations

Since 1960, North Haven has had zoning regulations in effect which provide for permitted uses in industrial zones delineated within the town. The town's regulations are permissive in nature, meaning that only those uses which are expressly allowed are permitted. Upjohn's North Haven facility is located in an industrial zone designated IG-80. Upjohn's manufacturing processes have always been permitted in this zone. Since 1960, residents of an IG zone were also permitted to engage in "accessory uses customarily incidental to a permitted use on the same premises." Furthermore, since 1960, North Haven's regulations have provided that any non-conforming use lawfully existing at the effective date of the regulations or any amendment may be continued.

The Commission became aware of the manner in which Upjohn was disposing of its sludge sometime in the late

1970's. The Commission and Upjohn had numerous communications concerning the defendant's wastewater treatment and disposal system from that time through 1986. In 1983, the Commission sent a letter advising Upjohn that it had approved defendant's applications for permits concerning additions to the wastewater treatment system subject to certain conditions, including that Upjohn submit a plan and a timetable for the removal of all existing sludge. Pltf's exh. 32. The Town also amended its zoning regulations so as to provide "[n]o storage of any type . . . shall be permitted outside of an enclosed area without the expressed site plan approval of the Planning and Zoning Commission."

On June 3, 1985, Upjohn informed the Commission that it was about to implement a system reducing solid waste generation by 90 percent, and that it was investigating possible uses for the existing sludge, including ways to convert the sludge to non-toxic materials. Pltf's exh. 33. Upjohn also advised the Commission that it intended to pursue these options primarily, but that it would dispose of material from the pile at a rate of one truckload per week. *Id.* The Commission replied that this course of action was unacceptable, and that unless Upjohn made a more substantial commitment to removing the accumulated sludge, the Commission would be forced to issue a Cease and Desist Order. Pltf's exh. 33. On May 16, 1986, the North Haven Zoning Enforcement Officer formally informed Upjohn that it was in violation of the conditions attached to zoning approvals granted in February, 1983, and ordered it to cease and desist all outdoor storage of sludge on the property. Pltf's exh. 4. On May 23, 1986, the Commission informed the Connecticut Department of Environmental Protection ("DEP") that Upjohn was in violation of North Haven's zoning regulations. Pltf's exh. 3. Upjohn subsequently appealed the action of the Zoning Enforcement Officer to the Zoning Board of Appeals. That body upheld the Officer's actions. Thereafter, Upjohn appealed the Board's decision to the

Connecticut Superior Court. *Upjohn Co. v. Zoning Bd. of Appeals of the Town of North Haven*, CV-86-0250632 (Conn. Super. Ct.). That appeal is still pending. Pltf's exh. 13A.

Since at least 1981, Upjohn contemplated closing the sludge pile when it reached capacity, which was estimated to be approximately 90,000 cubic yards. Def's exhs. 503, 505. In early 1986, Upjohn submitted its closure plan for the sludge pile, prepared by Malcolm Pirnie, Inc., to the EPA and DEP. As described above, this plan proposed capping the pile, and did not propose removal of the material. After receiving comments concerning this plan, Upjohn submitted revised plans in January, 1988, and again in July, August, and September, 1989. Counsel for plaintiffs sent a letter to the EPA and DEP on March 28, 1988, commenting on the proposed capping plan. Pltf's exh. 13A at ¶ 10. Plaintiffs also testified at a hearing held by the EPA and DEP on June 15, 1988 addressing the plan. Id. at ¶ 11. On September 29, 1989, the DEP and EPA formally approved Upjohn's capping plan. Def's exh. 524.

On June 15, 1988, the DEP Commissioner issued an Order requiring Upjohn to take all steps necessary to install certain wastewater treatment facilities as required to comply with the applicable state water pollution discharge regulations. Def's exh. 522 at A. The Order further provided that noncompliance with these provisions would result in monetary penalties. *Id.* Upjohn subsequently applied to the Commission for permits to make modifications to its wastewater treatment system. Pltf's exh. 13A at ¶¶ 15 & 16. At a January 17, 1989 meeting, the Commission denied these applications solely on the basis of the alleged zoning violations; i.e., the sludge pile. *Id.* at ¶ 17. Plaintiffs concede that absent these violations, Upjohn's applications met the requirements of the zoning regulations. Pltf's Post-Trial Brief at 37-38.

Upjohn's capping plan includes activities such as regrading and excavation which also require permits and approvals under the town's zoning regulations. Upjohn has not applied for, nor received these permits or approvals. Nevertheless, Upjohn recently began to implement the first stage of its capping plan. Shortly after the conclusion of trial, Upjohn announced its intention to close its North Haven manufacturing facility.

CONCLUSIONS OF LAW

Plaintiffs' argument is essentially that: (1) Upjohn has begun certain work pursuant to the closure plan which requires permits and approvals from the Commission, which Upjohn has neither applied for nor received; and, (2) the presence of the sludge pile on the defendant's property is in violation of town zoning regulations and the Zoning Enforcement Officer's Cease and Desist Order. Plaintiff seeks an order enjoining the implementation of the closure plan, and requiring Upjohn to bring the property into compliance with the zoning regulations.

Defendant claims: (1) the provisions of RCRA and the EPA/DEP Approval preempt the plaintiffs' order requiring removal of the pile; 2) the provisions of RCRA and the DEP/EPA Approval preempt the plaintiffs from enforcing the zoning regulations so as to prevent implementation of the closure plan, or from denying the necessary permits on the basis of the existence of the pile on the premises; (3) the June 15, 1988 DEP Order preempts the Commission from denying the applications concerning the wastewater treatment system; and, (4) the sludge pile is not a zoning violation. Upjohn seeks an order enjoining the plaintiffs from enforcing the Cease and Desist Order, from enforcing the town zoning regulations so as to prevent it from implementing the interim phase of the closure plan, and to prevent the plaintiffs from denying applications for wastewater treatment system additions.

At the outset, the Court observes that despite the many issues the parties have presented for resolution, the Court shall only examine whether Upjohn need apply for certain permits, and the effects of its failure to so apply.

There are several reasons why the Court limits its evaluation to these areas. First, Upjohn has appealed the decision of the North Haven Zoning Board of Appeals upholding the Commission's finding that the pile constitutes a zoning violation, and that case is still pending in Connecticut Superior Court. *See supra.* Local land use decisions have repeatedly been held to be issues of local concern. *Northeast Mines, Inc. v. Smithtown*, 584 F. Supp. 112, 114-15 (E.D.N.Y. 1984) (citing *Louisiana Power & Light Co. v. Thibidoux*, 360 U.S. 25 (1959)). Accordingly, resolution of Upjohn's contention that it has not committed a zoning violation is not properly before this Court. *Id.* For purposes of this dispute, the Court must consider that, as matters currently stand, the presence of the pile on the Upjohn property constitutes a zoning violation.

Second, the Court shall not resolve the defendant's contention that the Order issued on June 15, 1988 by the DEP pursuant to the Connecticut Water Pollution Control Act, Connecticut General Statutes § 22a-416 *et seq.*, preempts the Commission from denying Upjohn's applications to make wastewater treatment system improvements. The Commission has conceded that the applications were satisfactory in all respects, but that the permits could not be issued until Upjohn remedied the existing zoning violation.

The present record casts serious doubt on the merits of Upjohn's suggestion that unless it is allowed to make the needed improvements it cannot avoid violation of Connecticut law. There is nothing to prevent Upjohn from ceasing operations which produce illegal discharge. Furthermore, the terms of the Order require Upjohn to "take such action as is necessary" to install the required equip-

ment. Def's exh. 522 at A. Remedying the existing zoning violation would enable Upjohn to obtain the needed permits. *See* pltf's exh. 13A at ¶ 17 (applications denied solely on basis of alleged illegal existence of pile). More significantly, however, the Court notes that defendant presented this exact question—whether the DEP Order preempts local regulations—to the Connecticut Superior Court in a motion to strike the complaint in *Carothers v. Upjohn Co., Inc.*, No. CV 89-0363075 S (Conn. Super. Ct. July 13, 1989). As there is thus an ongoing state judicial proceeding considering this issue and as these questions concern important state interests, and are of peculiarly local concern, resolution of how local zoning regulations should be construed in light of state law is best left to the state judiciary, given the circumstances of this case. *See Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982); *Younger v. Harris*, 401 U.S. 37 (1971); and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Accordingly, the Court abstains from considering the merits of defendant's claim in this regard.

Nothing precludes the Court from resolving the question of federal preemption, however, nor any of the other issues which the parties have not raised elsewhere. Accordingly, the Court now turns to these questions.

The capping plan calls for the addition of gravel and top soil to the sludge pile, as well as excavation and regrading, and the placement of collection and test wells, among other things. The North Haven Zoning Regulations require residents who intend to perform such activities to apply for and obtain permits. Pltf's exh. 3 at § 8.1 *et seq.* Upjohn has begun construction pursuant to its plan. It has neither applied for nor obtained such permits. Plaintiffs' amended complaint asserts that implementation of the capping plan will constitute new zoning violations and increase the size and scope of the already existing zoning violations.

Connecticut General Statutes § 8-12 provides that a town's zoning enforcement officer may institute an action to prevent the violation of zoning regulations. This section also provides for the issuance of an injunction to remedy a violation of local zoning regulations. Accordingly, as a plaintiff in such an action, the zoning enforcement officer need not show irreparable harm or the lack of an adequate remedy at law to obtain an injunction preventing the violation. *Johnson v. Murzyn*, 1 Conn. App. 176, 179-81, *cert. denied*, 192 Conn. 802 (1984) (enactment of statute assumes that no adequate alternative remedy exists and that injury is irreparable); *see also United States v. Diapulse Corp. of America*, 457 F.2d 25 (2d Cir. 1972) (same).

Upjohn argues that it need not obtain any permits from plaintiffs to implement its capping plan since the Commission cannot issue approvals due to its determination that there is an existing zoning violation on the site. The defendant also argues that the EPA/DEP approval compels it to implement its closure plan, but that the zoning regulations and the Commission's actions prohibit Upjohn from beginning work. Defendant claims that since compliance with both federal and local law is impossible, local law is preempted.

The only support defendant cites in support of its first argument—that since the Commission will deny the permits it need not apply—is *Kosinski v. Lawlor*, 177 Conn. 420, 425 (1979). In that case the plaintiff sought a writ of mandamus directing the local planning and zoning commission to approve a proposed site plan. *Id.* at 122. On appeal, the Connecticut Supreme Court rejected defendants' argument that in order to obtain such relief the plaintiff needed to first apply for and be denied building permits. *Id.* at 425-27. As this defendant correctly notes, the Court wrote that it would not require the exhaustion of an administrative remedy when that remedy is either inadequate or futile. *Id.* at 425. Contrary to defendant's

implication, however, this decision and the indicated language in no way sanction a party to ignore any zoning regulations and proceed without necessary authorization simply because an application would be denied. Rather, the case suggests that courts may review the merits of an application if administrative denial is sufficiently definite. *Id.* Adopting defendant's suggestion would permit any resident to engage in a land use without authorization so long as he or she could be certain that the use would not be permitted, an untenable result. Defendant's contention that it need not have applied for the appropriate permits and approval on this ground is, therefore, without merit.

The defendant has also claimed, however, that federal law preempts the local requirements, and has filed a counterclaim seeking to restrain the plaintiffs from enforcing the regulations so as to prevent Upjohn from implementing the plan, or from enforcing the Cease and Desist Order. Thus, the Court needs to resolve whether RCRA and the EPA/DEP Approval preempt the local zoning regulations and the Commission in these respects.

Under the Supremacy Clause of the Constitution, federal law may preempt state and municipal law in several different ways. *See generally Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712-13 (1985); *Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1984); *Environmental Encapsulating Corp. v. New York City*, 855 F.2d 48, 53 (2d Cir. 1988). Congress may preempt state or local law by so stating in explicit terms on the face of a statute. *Adams Fruit Co., Inc. v. Barrett*, 58 U.S.L.W. 4367, 4368 (March 21, 1990) (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). Absent such express language, preemption will be implied where federal legislation is so comprehensive in a given area as to leave no room for supplemental state or local legislation. *International Paper Co. v. Ouelette*, 479 U.S.

481, 491 (1987). Finally, even if Congress has not displaced state or local action in an area, state or local law is displaced to the extent that it actually conflicts with federal law, or with congressional purposes and goals. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). A local regulation that frustrates a federal scheme is preempted. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985). As to the third type of preemption—actual conflict, or frustration of congressional purposes—there is no rigid formula to determine whether a local regulation conflicts with federal law. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (Court has used variety of expressions in considering validity of state laws in light of federal law, including "irreconcilable" and "repugnant", as well as "different" and "inconsistent").

In amending RCRA in 1984, Congress expressly declared "the national policy of the United States [to be] that wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible . . . [w]aste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment." 42 U.S.C. § 6902(b). Congress, however, neither expressly preempted nor impliedly occupied the entire field of hazardous waste regulation through RCRA. *Ogden Environmental Services v. San Diego*, 687 F. Supp. 1436, 1444 (S.D. Cal. 1988). In fact, one of RCRA's express objectives is to establish a cooperative effort among the federal, state, and local governments and private enterprise to carry out the purposes of the Act. 42 U.S.C. § 6902(a)(7).

RCRA has a "savings" clause to promulgate this cooperation which provides "[n]othing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those

imposed by such (RCRA and EPA) regulations." 42 U.S.C. § 6929.

Although courts within this circuit have not addressed the question of federal preemption posed in this case, courts from other circuits have considered the effect of RCRA regulations and EPA approvals pursuant to RCRA authorization upon local regulations. The Eighth Circuit considered the effect of the RCRA savings clause in a county's defense of an ordinance in the face of a preemption claim. *ENSCO, Inc. v. Dumas*, 807 F.2d 743 (1986). In that case, after the EPA passed regulations governing the incineration and disposal of certain hazardous wastes pursuant to RCRA authorization, ENSCO announced that it would seek EPA certification to incinerate the wastes governed by such regulations at its Union County, Arkansas facility. *Id.* at 744. The County subsequently passed an ordinance which provided, among other things, that the hazardous wastes covered by the regulations could not be "stored, treated, or disposed of within the County." *Id.* ENSCO brought suit challenging the validity of the ordinance. *Id.* The district court found for ENSCO. *Id.*

On appeal, the Eighth Circuit affirmed the district court's decision, holding that RCRA preempted enforcement of the ordinance. *Id.* at 745. While acknowledging that the language in the RCRA savings clause indicated that Congress had not preempted all local regulations, the Eighth Circuit held that the ordinance stood in conflict with the purposes and objectives of RCRA. *Id.* at 744-45. The county's ban on the materials altogether ignored that these particular hazardous wastes exist. *Id.* at 745. In essence, the County's ban mandated that the wastes would not be handled in the manner deemed safest by RCRA and the EPA. *Id.* As to the savings clause, the Eighth Circuit wrote "[a] county cannot, by attaching the label 'more stringent requirements' or 'site selection' to an ordinance . . . , arrogate to itself the power

to enact a measure that as a practical matter cannot function other than to subvert federal policies . . . ." *Id.*

The Southern District of California also considered a situation akin to the one presented here in *Ogden.* 687 F. Supp. at 1436. Pursuant to RCRA regulations, Ogden applied to the EPA for permission to conduct hazardous waste incineration testing in San Diego. *Id.* at 1438. After extensive consideration of the proposal, the EPA approved the project. *Id.* Subsequently, the City Council passed an ordinance requiring a conditional use permit for any facility, activity, or use of property "which is required by federal law to obtain a . . . permit from the EPA . . . pursuant to [RCRA]." *Id.* at 1440. Ogden applied for such a permit. *Id.* Ultimately, after extensive discussion which included testimony from EPA representatives, the City Council voted to deny Ogden's application. *Id.* at 1441. Ogden subsequently brought suit, claiming RCRA and the EPA approval preempted the City's action. *Id.*

The Court upheld the plaintiff's claim, finding that RCRA and the EPA approval preempted the Council from denying the permit on the basis of generalized safety concerns, where the EPA had already found safety risks to be acceptable. *Id.* at 1447-1450. The Court found that while the RCRA savings clause provided for local adoption of more stringent environmental standards, and expressly provided for local governments to play a role in site selection, the city's action in this case stood as an obstacle to clear congressional purposes. *Id.* In evaluating the effect of the savings clause, the Court noted that the *ENSCO* decision stood for the principle that local governments cannot directly subvert RCRA and EPA decisions through outright bans on activities federal authorities consider safe. *Id.* at 1446. The Court then observed that requiring the application for a use permit, rather than an outright ban, created the potential for subterfuge, permitting a local government "to do indi-

rectly what the ENSCO court found the City cannot do directly." *Id.* Nevertheless, the Court also wrote that to construe every permit denial as creating a *de facto* conflict with congressional objectives would substantially eviscerate the role of local governments in choosing one site over another, a role presumably envisoned by the savings clause. *Id.* Ultimately, the Court ruled that, on the record in that case, the stated reasons for the city's denial of the permit were insufficient. *Id.* at 1449.

The Court now turns to the federal and local law allegedly in conflict in this case. To accomplish the federal goal of sound hazardous waste management, RCRA requires a producer of hazardous waste to develop and submit for EPA approval a plan for closure of the hazardous waste site. *See* 40 C.F.R. § 265.112. Specifically, any owner or operator of a hazardous waste site must close the facility in a manner which minimizes the need for maintenance of the site and controls or eliminates, to the extent necessary to protect human health and the environment, post-closure escape of the types of waste addressed by RCRA. *Id.* at § 265.111. It is clear from the text of the Act that closure can be accomplished through any means approved by the EPA, including the removal of hazardous materials. *See* 40 C.F.R. § 265.113(a).

The EPA/DEP Approval cited by the defendant provides that Upjohn's proposed plan complies with RCRA and Connecticut hazardous waste site closure requirements. Def's exh. 524.

The North Haven Zoning Regulations at issue, as described above, do not specifically address *hazardous* waste storage or disposal. One set of regulations at issue concerns the necessity of permits and approval for excavation and construction. Pltf's exh. 3 at 3.26, 3.27. More generally, the regulations require site plan approval for any change in use of a property. *Id.* at 3.27(a). The regulations also provide a procedure through which ap-

plications for such approvals are made. *Id.* at 3.27.2 *et seq.* The regulations further provide that the Commission shall not approve a site plan unless all of the town regulations are met. *Id.* at 3.27.1. RCRA does not specifically address any of these issues. Nor does the Court find that simply requiring such approval and permits frustrates congressional purposes. *See Ogden*, 687 F. Supp. at 1445 (requirement of use permit is not *per se* preempted); *cf. Pacific Gas & Electric*, 461 U.S. at 190 (Congress' inclusion of savings clause indicated intent for states to retain traditional responsibilities in field).

The town regulations, as interpreted by the Commission and the Zoning Enforcement Officer, do not provide for the storage of this type of waste on property such as defendant's, absent express permission from the Commission. *See* Pltf's exh. 13A at ¶ 8 (Cease and Desist Order issued and upheld). Recently, the town has amended the regulations to explicitly provide that plots within the town shall not be used to store waste products unless enclosed within a building absent the expressed site plan approval of the Commission. Pltf's exh. 3 at 3.27.2.24. The Commission may grant approval of such activity, after having considered the activity's impact upon public safety, health, sanitation and aesthetics. *Id.* Although RCRA obviously addresses these matters, it expressly provides for the establishment of more stringent local standards, and for local participation in site selection. 42 U.S.C. § 6929. Thus, since the provisions of RCRA and the town regulations are not themselves in conflict, to determine whether RCRA and the EPA/DEP Approval preempt the local regulations, the Court must examine whether the local activity in this field frustrates Congress' goals and purposes. *See Florida Lime and Avocado Growers*, 373 U.S. at 132, 141.

The Court first notes that this situation is dissimilar from the one presented in *ENSCO*. The town has not passed any ban in response to federal approval of cer-

tain activity. In other words, this case does not present a direct challenge to a federal determination.

Moreover, this case is unlike the situation presented in *Ogden*. First, concerning the capping plan, the defendant has not even applied to the town to use its property in the manner approved by the EPA and DEP. The exact holding of *Ogden*, that the city council failed to provide adequate reasons for denying the permit, is therefore inapplicable. Even assuming Upjohn applied, the town has offered a reason for denying the permit—the pre-existing zoning violation. Second, in *Ogden* the city denied the permit after the federal agency approved Ogden's plan. Here, after extensive interaction, the Commission found Upjohn in violation of the regulations before the defendant sought federal approval of its plan. The Commission's actions in no way indicate even an indirect challenge to federal authority.

Finally, although the Commission requires the defendant to remove the materials, rather than conduct the federally approved activities on its own property, the town has not banned this type of activity within the town. Quite to the contrary, the recent amendment of the regulations explicitly provides for residents to apply to the Commission to operate and close hazardous waste sites within the town, and provides for the Commission to evaluate the applications considering certain factors. Pltf's exh. 3 at 3.27.2.24. Rather than conflicting with RCRA, this would seem to be the exact sort of site selection process, or application of more stringent standards, envisioned by the savings clause. 42 U.S.C. § 6929. In sum, for all of the foregoing reasons, the Court finds that the local regulations are not preempted by RCRA.

Upjohn's argument that the Approval constitutes an EPA determination that Upjohn's plan represents the most sound environmental action, and therefore any obstacle to its implementation is an obstacle to congressional goals is also not persuasive. There are many

methods in which a hazardous waste site might be closed in accordance with RCRA, including removal. *See* 40 C.F.R. § 265.113(a). The language of the Approval contains no indication that the EPA or DEP has determined that this method of closure is the *most* environmentally protective. *See* Def's exh. 524. Furthermore, the conclusion that the EPA and DEP simply determined that federal and state standards were satisfied by the plan is supported by the fact that these agencies issued an Approval, rather than an order. Indeed, in a different context the defendant points out that the EPA had the power to issue an order requiring Upjohn to remove the material. Def's Post-Trial Brief at 18. The Court refuses to draw a conclusion from the fact that the agencies issued the Approval with knowledge that the Commission considered the presence of the unclosed pile a zoning violation. The Court also notes that the language of the Approval itself includes that it does not relieve Upjohn from obtaining any further authorizations required by the Connecticut General Statutes, which provide for the enactment of local zoning regulations. CONN. GEN. STAT. §§ 8-1, 8-2. For all of the foregoing reasons, and in light of the RCRA savings clause providing for a role for local government, the Court finds that the Approval does not preempt the Commission's actions or the local zoning requirements.

CONCLUSION

For all of the foregoing reasons, the Court finds that the zoning regulations of the town of North Haven are not preempted by federal law or federal action. Accordingly, the relief plaintiff seeks is hereby GRANTED in part, such that Upjohn is hereby ENJOINED from implementing its temporary or final closure plan of the north sludge pile until such time as it has obtained the necessary permits from the Commission. Furthermore, for all of the foregoing reasons, the relief sought by de-

fendant in its counterclaim is hereby DENIED. Finally, the Court hereby abstains from considering the remainder of the relief sought by plaintiffs or defendant.

SO ORDERED.

Dated at Bridgeport, Connecticut this 31st day of May, 1990.

/s/ T. F. Gilroy Daly
T. F. GILROY DALY
U.S.D.J.

APPENDIX C

STATUTES AND REGULATIONS

The Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. § 6901 *et seq.*—which is part of the Solid Waste Disposal Act (SWDA)—provides in pertinent part:

SUBCHAPTER I—GENERAL PROVISIONS

42 U.S.C. § 6901. Congressional findings [RCRA/ SWDA § 1002]

(a) Solid waste

The Congress finds with respect to solid waste—

(1) that the continuing technological progress and improvement in methods of manufacture, packaging, and marketing of consumer products has resulted in an ever-mounting increase, and in a change in the characteristics, of the mass material discarded by the purchaser of such products;

(2) that the economic and population growth of our Nation, and the improvements in the standard of living enjoyed by our population, have required increased industrial production to meet our needs, and have made necessary the demolition of old buildings, the construction of new buildings, and the provision of highways and other avenues of transportation, which, together with related industrial, commercial, and agricultural operations, have resulted in a rising tide of scrap, discarded, and waste materials;

(3) that the continuing concentration of our population in expanding metropolitan and other urban areas has presented these communities with serious financial, management, intergovern-

mental, and technical problems in the disposal of solid wastes resulting from the industrial, commercial, domestic, and other activities carried on in such areas;

(4) that while the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies, the problems of waste disposal as set forth above have become a matter national in scope and in concern and necessitate Federal action through financial and technical assistance and leadership in the development, demonstration, and application of new and improved methods and processes to reduce the amount of waste and unsalvageable materials and to provide for proper and economical solid waste and disposal practices.

(b) Environment and health

The Congress finds with respect to the environment and health, that—

(1) although land is too valuable a national resource to be needlessly polluted by discarded materials, most solid waste is disposed of on land in open dumps and sanitary landfills;

(2) disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment;

(3) as a result of the Clean Air Act [42 U.S.C.A. § 7401 et seq.], the Water Pollution Control Act [33 U.S.C.A. § 1251 et seq.], and other Federal and State laws respecting public health and the environment, greater amounts of solid waste (in the form of sludge and other pollution treatment residues) have been created. Similarly, inadequate and environmentally un-

sound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health;

(4) open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land;

(5) the placement of inadequate controls on hazardous waste management will result in substantial risks to human health and the environment;

(6) if hazardous waste management is improperly performed in the first instance, corrective action is likely to be expensive, complex, and time consuming;

(7) certain classes of land disposal facilities are not capable of assuring long-term containment of certain hazardous wastes, and to avoid substantial risk to human health and the environment, reliance on land disposal should be minimized or eliminated, and land disposal, particularly landfill and surface impoundment, should be the least favored method for managing hazardous wastes; and

(8) alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable solid waste disposal sites within five years unless immediate action is taken.

(c) Materials

The Congress finds with respect to materials, that—

(1) millions of tons of recoverable material which could be used are needlessly buried each year;

(2) methods are available to separate usable materials from solid waste; and

(3) the recovery and conservation of such materials can reduce the dependence of the United States on foreign resources and reduce the deficit in its balance of payments.

(d) Energy

The Congress finds with respect to energy, that—

(1) solid waste represents a potential source of solid fuel, oil, or gas that can be converted into energy;

(2) the need exists to develop alternative energy sources for public and private consumption in order to reduce our dependence on such sources as petroleum products, natural gas, nuclear and hydroelectric generation; and

(3) technology exists to produce usable energy from solid waste.

* * * *

42 U.S.C. § 6902. Objectives and national policy [RCRA/SWDA § 1003]

(a) Objectives

The objectives of this chapter are to promote the protection of health and the environment and to conserve valuable material and energy resources by—

(1) providing technical and financial assistance to State and local governments and interstate agencies for the development of solid waste management plans (including resource recovery

and resource conservation systems) which will promote improved solid waste management techniques (including more effective organizational arrangements), new and improved methods of collection, separation, and recovery of solid waste, and the environmentally safe disposal of nonrecoverable residues;

(2) providing training grants in occupations involving the design, operation, and maintenance of solid waste disposal systems;

(3) prohibiting future open dumping on the land and requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health;

(4) assuring that hazardous waste management practices are conducted in a manner which protects human health and the environment;

(5) requiring that hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date;

(6) minimizing the generation of hazardous waste and the land disposal of hazardous waste by encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment;

(7) establishing a viable Federal-State partnership to carry out the purposes of this chapter and insuring that the Administrator will, in carrying out the provisions of subchapter III of this chapter give a high priority to assisting and cooperating with States in obtaining full authorization of State programs under subchapter III of this chapter;

(8) providing for the promulgation of guidelines for solid waste collection, transport, separa-

tion, recovery, and disposal practices and systems;

(9) promoting a national research and development program for improved solid waste management and resource conservation techniques, more effective organizational arrangements, and new and improved methods of collection, separation, and recovery, and recycling of solid wastes and environmentally safe disposal of nonrecoverable residues;

(10) promoting the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of air, water, and land resources; and

(11) establishing a cooperative effort among the Federal, State, and local governments and private enterprise in order to recover valuable materials and energy from solid waste.

(b) National policy

The Congress hereby declares it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.

42 U.S.C. § 6903. Definitions [RCRA/SWDA § 1004]

As used in this chapter:

(1) The term "Administrator" means the Administrator of the Environmental Protection Agency.

(2) The term "construction," with respect to any project of construction under this chapter, means (A) the erection or building of new structures and acquisition of lands or interests therein, or the acquisition, replacement, expansion, remodeling, alteration, modernization, or extension of existing structures, and (B) the acquisition and installation of initial equipment of, or required in connection with, new or newly acquired structures or the expanded, remodeled, altered, modernized or extended part of existing structures (including trucks and other motor vehicles, and tractors, cranes, and other machinery) necessary for the proper utilization and operation of the facility after completion of the project; and includes preliminary planning to determine the economic and engineering feasibility and the public health and safety aspects of the project, the engineering, architectural, legal, fiscal, and economic investigations and studies, and any surveys, designs, plans, working drawings, specifications, and other action necessary for the carrying out of the project, and (C) the inspection and supervision of the process of carrying out the project to completion.

(2A) The term "demonstration" means the initial exhibition of a new technology process or practice or a significantly new combination or use of technologies, processes or practices, subsequent to the development stage, for the purpose of proving technological feasibility and cost effectiveness.

(3) The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid

waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

(4) The term "Federal agency" means any department, agency, or other instrumentality of the Federal Government, any independent agency or establishment of the Federal Government including any Government corporation, and the Government Printing Office.

(5) The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

(6) The term "hazardous waste generation" means the act or process of producing hazardous waste.

(7) The term "hazardous waste management" means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes.

(8) For purposes of Federal financial assistance (other than rural communities assistance), the term "implementation" does not include the

acquisition, leasing, construction, or modification of facilities or equipment or the acquisition, leasing, or improvement of land.

(9) The term "intermunicipal agency" means an agency established by two or more municipalities with responsibility for planning or administration of solid waste.

(10) The term "interstate agency" means an agency of two or more municipalities in different States, or an agency established by two or more States, with authority to provide for the management of solid wastes and serving two or more municipalities located in different States.

(11) The term "long-term contract" means, when used in relation to solid waste supply, a contract of sufficient duration to assure the viability of a resource recovery facility (to the extent that such viability depends upon solid waste supply).

(12) The term "manifest" means the form used for identifying the quantity, composition, and the origin, routing, and destination of hazardous waste during its transportation from the point of generation to the point of disposal, treatment, or storage.

(13) The term "municipality" (A) means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law, with responsibility for the planning or administration of solid waste management, or an Indian tribe or authorized tribal organization or Alaska Native village or organization, and (B) includes any rural community or unincorporated town or village or any other public entity for which an application for assistance is made by a State or political subdivision thereof.

(14) The term "open dump" means any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated under section 6944 of this title and which is not a facility for disposal of hazardous waste.

(15) The term "person" means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body.

(16) The term "procurement item" means any device, good, substance, material, product, or other item whether real or personal property which is the subject of any purchase, barter, or other exchange made to procure such item.

(17) The term "procuring agency" means any Federal agency, or any State agency or agency of a political subdivision of a State which is using appropriated Federal funds for such procurement, or any person contracting with any such agency with respect to work performed under such contract.

(18) The term "recoverable" refers to the capability and likelihood of being recovered from solid waste for a commercial or industrial use.

(19) The term "recovered material" means waste material and byproducts which have been recovered or diverted from solid waste, but such term does not include those materials and byproducts generated from, and commonly reused within, an original manufacturing process.

(20) The term "recovered resources" means material or energy recovered from solid waste.

(21) The term "resource conservation" means reduction of the amounts of solid waste that are

generated, reduction of overall resource consumption, and utilization of recovered resources.

(22) The term "resource recovery" means the recovery of material or energy from solid waste.

(23) The term "resource recovery system" means a solid waste management system which provides for collection, separation, recycling, and recovery of solid wastes, including disposal of nonrecoverable waste residues.

(24) The term "resource recovery facility" means any facility at which solid waste is processed for the purpose of extracting, converting to energy, or otherwise separating and preparing solid waste for reuse.

(25) The term "regional authority" means the authority established or designated under section 6946 of this title.

(26) The term "sanitary landfill" means a facility for the disposal of solid waste which meets the criteria published under section 6944 of this title.

(26A) The term "sludge" means any solid, semi-solid or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility or any other such waste having similar characteristics and effects.

(27) The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural op-

erations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 U.S.C.A. § 2011 et seq.].

(28) The term "solid waste management" means the systematic administration of activities which provide for the collection, source separation, storage, transportation, transfer, processing, treatment, and disposal of solid waste.

(29) The term "solid waste management facility" includes—

(A) any resource recovery system or component thereof,

(B) any system, program, or facility for resource conservation, and

(C) any facility for the collection, source separation, storage, transportation, transfer, processing, treatment or disposal of solid wastes, including hazardous wastes, whether such facility is associated with facilities generating such wastes or otherwise.

(30) The terms "solid waste planning", "solid waste management", and "comprehensive planning" include planning or management respecting resource recovery and resource conservation.

(31) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands,

Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(32) The term "State authority" means the agency established or designated under section 6947 of this title.

(33) The term "storage", when used in connection with hazardous waste, means the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste.

(34) The term "treatment", when used in connection with hazardous waste, means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

(35) The term "virgin material" means a raw material, including previously unused copper, aluminum, lead, zinc, iron, or other metal or metal ore, any undeveloped resource that is, or with new technology will become, a source of raw materials.

(36) The term "used oil" means any oil which has been—

(A) refined from crude oil,

(B) used, and

(C) as a result of such use, contaminated by physical or chemical impurities.

(37) The term "recycled oil" means any used oil which is reused, following its original use, for any purpose (including the purpose for which the oil was originally used). Such term includes oil which is re-refined, reclaimed, burned, or reprocessed.

(38) The term "lubricating oil" means the fraction of crude oil which is sold for purposes of reducing friction in any industrial or mechanical device. Such term includes re-refined oil.

(39) The term "re-refined oil" means used oil from which the physical and chemical contaminants acquired through previous use have been removed through a refining process.

(40) Except as otherwise provided in this paragraph, the term "medical waste" means any solid waste which is generated in the diagnosis, treatment, or immunization of human beings or animals, in research pertaining thereto, or in the production or testing of biologicals. Such term does not include any hazardous waste identified or listed under subchapter III of this chapter or any household waste as defined in regulations under subchapter III of this chapter.

* * * *

42 U.S.C. § 6905. Application of chapter and integration with other Acts [RCRA/ SWDA § 1006]

* * * *

(b) Integration with other Acts

(1) The Administrator shall integrate all provisions of this chapter for purposes of administration

and enforcement and shall avoid duplication, to the maximum extent practicable, with the appropriate provisions of the Clean Air Act [42 U.S.C. § 7401 et seq.], the Federal Water Pollution Control Act [33 U.S.C. § 1251 et seq.], the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C. § 136 et seq.], the Safe Drinking Water Act [42 U.S.C. § 300f et seq.], the Marine Protection, Research and Sanctuaries Act of 1972 [33 U.S.C. § 1401 et seq.], and such other Acts of Congress as grant regulatory authority to the Administrator. Such integration shall be effected only to the extent that it can be done in a manner consistent with the goals and policies expressed in this chapter and in the other acts referred to in this subsection.

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SUBCHAPTER III—HAZARDOUS WASTE MANAGEMENT

42 U.S.C. § 6921. Identification and listing of hazardous waste [RCRA/SWDA § 3001]

(a) Criteria for identification or listing

Not later than eighteen months after October 21, 1976, the Administrator shall, after notice and opportunity for public hearing, and after consultation with appropriate Federal and State agencies, develop and promulgate criteria for identifying the characteristics of hazardous waste, and for listing hazardous waste, which should be subject to the provisions of this subchapter, taking into account toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics. Such criteria shall be revised from time to time as may be appropriate.

(b) Identification and listing

(1) Not later than eighteen months after October 21, 1976, and after notice and opportunity for public hearing, the Administrator shall promulgate regulations identifying the characteristics of hazardous waste, and listing particular hazardous wastes (within the meaning of section 6903(5) of this title), which shall be subject to the provisions of this subchapter. Such regulations shall be based on the criteria promulgated under subsection (a) of this section and shall be revised from time to time thereafter as may be appropriate. The Administrator, in cooperation with the Agency for Toxic Substances and Disease Registry and the National Toxicology Program, shall also identify or list those hazardous wastes which shall be subject to the provisions of this subchapter solely because of the presence in such wastes of certain constituents (such as identified carcinogens, mutagens, or teratagens) at levels in excess of levels which endanger human health.

* * * *

42 U.S.C. § 6922. Standards applicable to generators of hazardous waste [RCRA/SWDA § 3002]

(a) In general

Not later than eighteen months after October 21, 1976, and after notice and opportunity for public hearings and after consultation with appropriate Federal and State agencies, the Administrator shall promulgate regulations establishing such standards, applicable to generators of hazardous waste identified or listed under this subchapter, as may be necessary to protect human health and the environment. Such standards shall establish requirements respecting—

(1) recordkeeping practices that accurately identify the quantities of such hazardous waste generated, the constituents thereof which are significant in quantity or in potential harm to human health or the environment, and the disposition of such wastes;

(2) labeling practices for any containers used for the storage, transport, or disposal of such hazardous waste such as will identify accurately such waste;

(3) use of appropriate containers for such hazardous waste;

(4) furnishing of information on the general chemical composition of such hazardous waste to persons transporting, treating, storing, or disposing of such wastes;

(5) use of a manifest system and any other reasonable means necessary to assure that all such hazardous waste generated is designated for treatment, storage, or disposal in, and arrives at, treatment, storage, or disposal facilities (other than facilities on the premises where the waste is generated) for which a permit has been issued as provided in this subchapter, or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. § 1411 et seq.]; and

(6) submission of reports to the Administrator (or the State agency in any case in which such agency carries out a permit program pursuant to this subchapter) at least once every two years, setting out—

(A) the quantities and nature of hazardous waste identified or listed under this subchapter that he has generated during the year;

(B) the disposition of all hazardous waste reported under subparagraph (A);

(C) the efforts undertaken during the year to reduce the volume and toxicity of waste generated; and

(D) the changes in volume and toxicity of waste actually achieved during the year in question in comparison with previous years, to the extent such information is available for years prior to November 8, 1984.

(b) Waste minimization

Effective September 1, 1985, the manifest required by subsection (a)(5) of this section shall contain a certification by the generator that—

(1) the generator of the hazardous waste has a program in place to reduce the volume or quantity and toxicity of such waste to the degree determined by the generator to be economically practicable; and

(2) the proposed method of treatment, storage, or disposal is that practicable method currently available to the generator which minimizes the present and future threat to human health and the environment.

* * * *

42 U.S.C. § 6923. Standards applicable to transporters of hazardous waste [RCRA/SWDA § 3003]

(a) Standards

Not later than eighteen months after October 21, 1976, and after opportunity for public hearings, the Administrator, after consultation with the Secretary

of Transportation and the States, shall promulgate regulations establishing such standards, applicable to transporters of hazardous waste identified or listed under this subchapter, as may be necessary to protect human health and the environment. Such standards shall include but need not be limited to requirements respecting—

(1) recordkeeping concerning such hazardous waste transported, and their source and delivery points;

(2) transportation of such waste only if properly labeled;

(3) compliance with the manifest system referred to in section 6922(5) of this title; and

(4) transportation of all such hazardous waste only to the hazardous waste treatment, storage, or disposal facilities which the shipper designates on the manifest form to be a facility holding a permit issued under this subchapter, or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. § 1411 et seq.].

(b) Coordination with regulations of Secretary of Transportation

In case of any hazardous waste identified or listed under this subchapter which is subject to the Hazardous Materials Transportation Act (88 Stat. 2156; 49 U.S.C. 1801 et seq.), the regulations promulgated by the Administrator under this section shall be consistent with the requirements of such Act and the regulations thereunder. The Administrator is authorized to make recommendations to the Secretary of Transportation respecting the regulations of such hazardous waste under the Hazardous Materials Transportation Act and for addition of materials to be covered by such Act.

(c) Fuel from hazardous waste

Not later than two years after November 8, 1984, and after opportunity for public hearing, the Administrator shall promulgate regulations establishing standards, applicable to transporters of fuel produced (1) from any hazardous waste identified or listed under section 6921 of this title, or (2) from any hazardous waste identified or listed under section 6921 of this title and any other material, as may be necessary to protect human health and the environment. Such standards may include any of the requirements set forth in paragraphs (1) through (4) of subsection (a) of this section as may be appropriate.

42 U.S.C. § 6924. Standards applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities [RCRA/SWDA § 3004]

(a) In general

Not later than eighteen months after October 21, 1976, and after opportunity for public hearings and after consultation with appropriate Federal and State agencies, the Administrator shall promulgate regulations establishing such performance standards, applicable to owners and operators of facilities for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter, as may be necessary to protect human health and the environment. In establishing such standards the Administrator shall, where appropriate, distinguish in such standards between requirements appropriate for new facilities and for facilities in existence on the date of promulgation of such regulations. Such standards shall include, but need not be limited to, requirements respecting—

(1) maintaining records of all hazardous wastes identified or listed under this chapter which is treated, stored, or disposed of, as the case may be, and the manner in which such wastes were treated, stored, or disposed of;

(2) satisfactory reporting, monitoring, and inspection and compliance with the manifest system referred to in section 6922(5) of this title;

(3) treatment, storage, or disposal of all such waste received by the facility pursuant to such operating methods, techniques, and practices as may be satisfactory to the Administrator;

(4) the location, design, and construction of such hazardous waste treatment, disposal, or storage facilities;

(5) contingency plans for effective action to minimize unanticipated damage from any treatment, storage, or disposal of any such hazardous waste;

(6) the maintenance of operation of such facilities and requiring such additional qualifications as to ownership, continuity of operation, training for personnel, and financial responsibility (including financial responsibility for corrective action) as may be necessary or desirable; and

(7) compilance with the requirements of section 6925 of this title respecting permits for treatment, storage, or disposal.

No private entity shall be precluded by reason of criteria established under paragraph (6) from the ownership or operation of facilities providing hazardous waste treatment, storage, or disposal services where such entity can provide assurances of finan-

cial responsibility and continuity of operation consistent with the degree and duration of risks associated with the treatment, storage, or disposal of specified hazardous waste.

* * * *

42 U.S.C. § 6925. Permits for treatment, storage, or disposal of hazardous waste [RCRA/SWDA § 3005]

(a) Permit requirements

Not later than eighteen months after October 21, 1976, the Administrator shall promulgate regulations requiring each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter to have a permit issued pursuant to this section. Such regulations shall take effect on the date provided in section 6930 of this title and upon and after such date the treatment, storage, or disposal of any such hazardous waste and the construction of any new facility for the treatment, storage, or disposal of any such hazardous waste is prohibited except in accordance with such a permit. No permit shall be required under this section in order to construct a facility if such facility is constructed pursuant to an approval issued by the Administrator under section 2605(e) of Title 15 for the incineration of polycholorinated [*sic*] biphenyls and any person owning or operating such a facility may, at any time after operation or construction of such facility has begun, file an application for a permit pursuant to this section authorizing such facility to incinerate hazardous waste identified or listed under this subchapter.

(b) Requirements of permit application

Each application for a permit under this section shall contain such information as may be required under regulations promulgated by the Administrator, including information respecting—

(1) estimates with respect to the composition, quantities, and concentrations of any hazardous waste identified or listed under this subchapter, or combinations of any such hazardous waste and any other solid waste, proposed to be disposed of, treated, transported, or stored, and the time, frequency, or rate of which such waste is proposed to be disposed of, treated, transported, or stored; and

(2) the site at which such hazardous waste or the products of treatment of such hazardous waste will be disposed of, treated, transported to, or stored.

(c) Permit issuance

(1) Upon a determination by the Administrator (or a State, if applicable), of compliance by a facility for which a permit is applied for under this section with the requirements of this section and section 6924 of this title, the Administrator (or the State) shall issue a permit for such facilities. In the event permit applicants propose modification of their facilities, or in the event the Administrator (or the State) determines that modifications are necessary to conform to the requirements under this section and section 6924 of this title, the permit shall specify the time allowed to complete the modifications.

(2)(A)(i) Not later than the date four years after November 8, 1984, in the case of each application under this subsection for a permit for a land disposal facility which was submitted before such

date, the Administrator shall issue a final permit pursuant to such application or issue a final denial of such application.

(ii) Not later than the date five years after November 8, 1984, in the case of each application for a permit under this subsection for an incinerator facility which was submitted before such date, the Administrator shall issue a final permit pursuant to such application or issue a final denial of such application.

(B) Not later than the date eight years after November 8, 1984, in the case of each application for a permit under this subsection for any facility (other than a facility referred to in subparagraph (A)) which was submitted before such date, the Administrator shall issue a final permit pursuant to such application or issue a final denial of such application.

(C) The time periods specified in this paragraph shall also apply in the case of any State which is administering an authorized hazardous waste program under section 6926 of this title. Interim status under subsection (e) of this section shall terminate for each facility referred to in subparagraph (A)(ii) or (B) on the expiration of the five- or eight-year period referred to in subparagraph (A) or (B), whichever is applicable, unless the owner or operator of the facility applies for a final determination regarding the issuance of a permit under this subsection within—

(i) two years after November 8, 1984 (in the case of a facility referred to in subparagraph (A)(ii)), or

(ii) four years after November 8, 1984 (in the case of a facility referred to in subparagraph (B)).

(3) Any permit under this section shall be for a fixed term, not to exceed 10 years in the case of any land disposal facility, storage facility, or incinerator or other treatment facility. Each permit for a land disposal facility shall be reviewed five years after date of issuance or reissuance and shall be modified as necessary to assure that the facility continues to comply with the currently applicable requirements of this section and section 6924 of this title. Nothing in this subsection shall preclude the Administrator from reviewing and modifying a permit at any time during its term. Review of any application for a permit renewal shall consider improvements in the state of control and measurement technology as well as changes in applicable regulations. Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment.

(d) Permit revocation

Upon a determination by the Administrator (or by a State, in the case of a State having an authorized hazardous waste program under section 6926 of this title) of noncompliance by a facility having a permit under this chapter with the requirements of this section or section 6924 of this title, the Administrator (or State, in the case of a State having an authorized hazardous waste program under section 6926 of this title) shall revoke such permit.

(e) Interim status

(1) Any person who—

(A) owns or operates a facility required to have a permit under this section which facility—

(i) was in existence on November 19, 1980, or

(ii) is in existence on the effective date of statutory or regulatory changes under this chapter that render the facility subject to the requirement to have a permit under this section,

(B) has complied with the requirements of section 6930(a) of this title, and

(C) has made an application for a permit under this section

shall be treated as having been issued such permit until such time as final administrative disposition of such application is made, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. This paragraph shall not apply to any facility which has been previously denied a permit under this section or if authority to operate the facility under this section has been previously terminated.

(2) In the case of each land disposal facility which has been granted interim status under this subsection before November 8, 1984, interim status shall terminate on the date twelve months after November 8, 1984, unless the owner or operator of such facility—

(A) applies for a final determination regarding the issuance of a permit under subsection (c) of this section for such facility before the date twelve months after November 8, 1984; and

(B) certifies that such facility is in compliance with all applicable groundwater monitoring and financial responsibility requirements.

(3) In the case of each land disposal facility which is in existence on November 8, 1984 that render the facility subject to the requirement to have a permit under this section and which is granted interim status under this subsection, interim status shall terminate on the date twelve months after the date on which the facility first becomes subject to such permit requirement unless the owner or operator of such facility--

(A) applies for a final determination regarding the issuance of a permit under subsection (c) of this section for such facility before the date twelve months after the date on which the facility first becomes subject to such permit requirement; and

(B) certifies that such facility is in compliance with all applicable groundwater monitoring and financial responsibility requirements.

* * * *

(i) Interim status facilities receiving wastes after July 26, 1982

The standards concerning ground water monitoring, unsaturated zone monitoring, and corrective action, which are applicable under section 6924 of this title to new landfills, surface impoundments, land treatment units, and waste-pile units required to be permitted under subsection (c) of this section shall also apply to any landfill, surface impoundment, land treatment unit, or waste-pile unit qualifying for the authorization to operate under subsection (e) of this section which receives hazardous waste after July 26, 1982.

* * * *

42 U.S.C. § 6926. Authorized State hazardous waste programs [RCRA/SWDA § 3006]

(a) Federal guidelines

Not later than eighteen months after October 21, 1976, the Administrator, after consultation with State authorities, shall promulgate guidelines to assist States in the development of State hazardous waste programs.

(b) Authorization of State program

Any State which seeks to administer and enforce a hazardous waste program pursuant to this subchapter may develop and, after notice and opportunity for public hearing, submit to the Administrator an application, in such form as he shall require, for authorization of such program. Within ninety days following submission of an application under this subsection, the Administrator shall issue a notice as to whether or not he expects such program to be authorized, and within ninety days following such notice (and after opportunity for public hearing) he shall publish his findings as to whether or not the conditions listed in items (1), (2) and (3) below have been met. Such State is authorized to carry out such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste (and to enforce permits deemed to have been issued under section 6935(d)(1) of this title) unless, within ninety days following submission of the application the Administrator notifies such State that such program may not be authorized and, within ninety days following such notice and after opportunity for public hearing, he finds that (1) such State program is not equivalent to the Federal program under this subchapter, (2) such program is not consistent with the Federal or

State programs applicable in other States, or (3) such program does not provide adequate enforcement of compliance with the requirements of this subchapter. In authorizing a State program, the Administrator may base his findings on the Federal program in effect one year prior to submission of a State's application or in effect on January 26, 1983, whichever is later.

(c) Interim authorization

(1) Any State which has in existence a hazardous waste program pursuant to State law before the date ninety days after the date of promulgation of regulations under sections 6922, 6923, 6924, and 6925 of this title, may submit to the Administrator evidence of such existing program and may request a temporary authorization to carry out such program under this subchapter. The Administrator shall, if the evidence submitted shows the existing State program to be substantially equivalent to the Federal program under this subchapter, grant an interim authorization to the State to carry out such program in lieu of the Federal program pursuant to this subchapter for a period ending no later than January 31, 1986.

(2) The Administrator shall, by rule, establish a date for the expiration of interim authorization under this subsection.

(3) Pending interim or final authorization of a State program for any State which reflects the amendments made by the Hazardous and Solid Waste Amendments of 1984, the State may enter into an agreement with the Administrator under which the State may assist in the administration of the requirements and prohibitions which take effect pursuant to such Amendments.

(4) In the case of a State permit program for any State which is authorized under subsection (b) of this section or under this subsection, until such program is amended to reflect the amendments made by the Hazardous and Solid Waste Amendments of 1984 and such program amendments receive interim or final authorization, the Administrator shall have the authority in such State to issue or deny permits or those portions of permits affected by the requirements and prohibitions established by the Hazardous and Solid Waste Amendments of 1984. The Administrator shall coordinate with States the procedures for issuing such permits.

(d) Effect of State permit

Any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under this subchapter.

(e) Withdrawal of authorization

Whenever the Administrator determines after public hearing that a State is not administering and enforcing a program authorized under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw authorization of such program and establish a Federal program pursuant to this subchapter. The Administrator shall not withdraw authorization of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(f) Availability of information

No State program may be authorized by the Administrator under this section unless—

(1) such program provides for the public availability of information obtained by the State regarding facilities and sites for the treatment, storage, and disposal of hazardous waste; and

(2) such information is available to the public in substantially the same manner, and to the same degree, as would be the case if the Administrator was carrying out the provisions of this subchapter in such State.

(g) Amendments made by 1984 act

(1) Any requirement or prohibition which is applicable to the generation, transportation, treatment, storage, or disposal of hazardous waste and which is imposed under this subchapter pursuant to the amendments made by the Hazardous and Solid Waste Amendments of 1984 shall take effect in each State having an interim or finally authorized State program on the same date as such requirement takes effect in other States. The administrator shall carry out such requirement directly in each such State unless the State program is finally authorized (or is granted interim authorization as provided in paragraph (2)) with respect to such requirement.

(2) Any State which, before November 8, 1984, has an existing hazardous waste program which has been granted interim or final authorization under this section may submit to the Administrator evidence that such existing program contains (or has been amended to include) any requirement which is substantially equivalent to a requirement referred to in paragraph (1) and may request interim authorization to carry out that requirement under this subchapter. The Administrator shall, if the evidence submitted shows the State requirement to be substantially equivalent to the requirement referred to in paragraph (1), grant an interim authorization to the State to carry out such requirement in lieu of

direct administration in the State by the Administrator of such requirement.

(h) State programs for used oil

In the case of used oil which is not listed or identified under this subtitle as a hazardous waste but which is regulated under section 6935 of this title, the provisions of this section regarding State programs shall apply in the same manner and to the same extent as such provisions apply to hazardous waste identified or listed under this subtitle.

* * * *

42 U.S.C. § 6929. Retention of State authority [RCRA/SWDA § 3009]

Upon the effective date of regulations under this subchapter no State or political subdivision may impose any requirements less stringent than those authorized under this subchapter respecting the same matter as governed by such regulations, except that if application of a regulation with respect to any matter under this subchapter is postponed or enjoined by the action of any court, no State or political subdivision shall be prohibited from acting with respect to the same aspect of such matter until such time as such regulation takes effect. Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations. Nothing in this chapter (or in any regulation adopted under this chapter) shall be construed to prohibit any State from requiring that the State be provided with a copy of each manifest used in connection with hazardous waste which is generated within that State or transported to a treatment, storage, or disposal facility within that State.

Section 104(c)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9604(c)(9), provides:

> **(9) Siting**
>
> Effective 3 years after October 17, 1986, the President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which—
>
> (A) have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of such contract or cooperative agreement and to be disposed of, treated, or destroyed,
>
> (B) are within the State or outside the State in accordance with an interstate agreement or regional agreement or authority,
>
> (C) are acceptable to the President, and
>
> (D) are in compliance with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.]

The interim status closure regulations applicable to hazardous waste disposal facilities, promulgated by the Environmental Protection Agency, 40 C.F.R. Part 265, subpart G, provide in pertinent part:

> **§ 265.111 Closure performance standard.**
>
> The owner or operator must close the facility in a manner that:

(a) Minimizes the need for further maintenance, and

(b) Controls, minimizes or eliminates, to the extent necessary to protect human health and the environment, post-closure escape of hazardous waste, hazardous constituents, leachate, contaminated runoff, or hazardous waste decomposition products to the ground or surface waters or to the atmosphere, and

(c) Complies with the closure requirements of this subpart including, but not limited to, the requirements of §§ 265.197, 265.228, 265.258, 265.280, 265.310, 265.351, 265.381 and 265.404.

§ 265.112 Closure plan; amendment of plan.

(a) *Written plan.* By May 19, 1981, the owner or operator of a hazardous waste management facility must have a written closure plan. Until final closure is completed and certified in accordance with § 265.115, a copy of the most current plan must be furnished to the Regional Administrator upon request, including request by mail. In addition, for facilities without approved plans, it must also be provided during site inspections, on the day of inspection, to any officer, employee or representative of the Agency who is duly designated by the Administrator.

(b) *Content of plan.* The plan must identify steps necessary to perform partial and/or final closure of the facility at any point during its active life. The closure plan must include, at least:

(1) A description of how each hazardous waste management unit at the facility will be closed in accordance with § 265.111; and

(2) A description of how final closure of the facility will be conducted in accordance with § 265.111.

The description must identify the maximum extent of the operation which will be unclosed during the active life of the facility; and

(3) An estimate of the maximum inventory of hazardous wastes ever onsite over the active life of the facility and a detailed description of the methods to be used during partial and final closure, including, but not limited to methods for removing, transporting, treating, storing or disposing of all hazardous waste, identification of and the type(s) of off-site hazardous waste management unit(s) to be used, if applicable; and

(4) A detailed description of the steps needed to remove or decontaminate all hazardous waste residues and contaminated containment system components, equipment, structures, and soils during partial and final closure including, but not limited to, procedures for cleaning equipment and removing contaminated soils, methods for sampling and testing surrounding soils, and criteria for determining the extent of decontamination necessary to satisfy the closure performance standard; and

(5) A detailed description of other activities necessary during the partial and final closure period to ensure that all partial closures and final closure satisfy the closure performance standards, including, but not limited to, ground-water monitoring, leachate collection, and run-on and run-off control; and

(6) A schedule for closure of each hazardous waste management unit and for final closure of the facility. The schedule must include, at a minimum, the total time required to close each hazardous waste management unit and the time required for intervening closure activities which will allow tracking of the progress of partial and final closure. (For ex-

ample, in the case of a landfill unit, estimates of the time required to treat or dispose of all hazardous waste inventory and of the time required to place a final cover must be included.) ; and

(7) An estimate of the expected year of final closure for facilities that use trust funds to demonstrate financial assurance under § 265.143 or § 265.145 and whose remaining operating life is less than twenty years, and for facilities without approved closure plans.

(c) *Amendment of plan.* The owner or operator may amend the closure plan at any time prior to the notification of partial or final closure of the facility. An owner or operator with an approved closure plan must submit a written request to the Regional Administrator to authorize a change to the approved closure plan. The written request must include a copy of the amended closure plan for approval by the Regional Administrator.

(1) The owner or operator must amend the closure plan whenever:

(i) Changes in operating plans or facility design affect the closure plan, or

(ii) There is a change in the expected year of closure, if applicable, or

(iii) In conducting partial or final closure activities, unexpected events require a modification of the closure plan.

(2) The owner or operator must amend the closure plan at least 60 days prior to the proposed change in facility design or operation, or no later than 60 days after an unexpected event has occurred which has affected the closure plan. If an unexpected event occurs during the partial or final closure period, the owner or operator must amend the clo-

sure plan no later than 30 days after the unexpected event. These provisions also apply to owners or operators of surface impoundments and waste piles who intended to remove all hazardous wastes at closure, but are required to close as landfills in accordance with § 265.310.

(3) An owner or operator with an approved closure plan must submit the modified plan to the Regional Administrator at least 60 days prior to the proposed change in facility design or operation, or no more than 60 days after an unexpected event has occurred which has affected the closure plan. If an unexpected event has occurred during the partial or final closure period, the owner or operator must submit the modified plan no more than 30 days after the unexpected event. These provisions also apply to owners or operators of surface impoundments and waste piles who intended to remove all hazardous wastes at closure but are required to close as landfills in accordance with § 265.310. If the amendment to the plan is a Class 2 or 3 modification according to the criteria in § 270.42, the modification to the plan will be approved according to the procedures in § 265.112 (d) (4).

(4) The Regional Administrator may request modifications to the plan under the conditions described in paragraph (c) (1) of this section. An owner or operator with an approved closure plan must submit the modified plan within 60 days of the request from the Regional Administrator, or within 30 days if the unexpected event occurs during partial or final closure. If the amendment is considered a Class 2 or 3 modification according to the criteria in § 270.42, the modification to the plan will be approved in accordance with the procedures in § 265.112(d) (4).

(d) *Notification of partial closure and final closure.* (1) The owner or operator must submit the closure plan to the Regional Administrator at least 180 days prior to the date on which he expects to begin closure of the first surface impoundment, waste pile, land treatment, or landfill unit, or final closure if it involves such a unit, whichever is earlier. The owner or operator must submit the closure plan to the Regional Administrator at least 45 days prior to the date on which he expects to begin final closure of a facility with only tanks, container storage, or incinerator units. Owners or operators with approved closure plans must notify the Regional Administrator in writing at least 60 days prior to the date on which he expects to begin closure of a surface impoundment, waste pile, landfill, or land treatment unit, or final closure of a facility involving such a unit. Owners and operators with approved closure plans must notify the Regional Administrator in writing at least 45 days prior to the date on which he expects to begin final closure of a facility with only tanks, container storage, or incinerator units.

(2) The date when he "expects to begin closure" must be either:

(i) Within 30 days after the date on which any hazardous waste management unit receives the known final volume of hazardous wastes or, if there is a reasonable possibility that the hazardous waste management unit will receive additional hazardous wastes, no later than one year after the date on which the unit received the most recent volume of hazardous wastes. If the owner or operator of a hazardous waste management unit can demonstrate to the Regional Administrator that the hazardous waste management unit or facility has the capacity to receive additional hazardous wastes and he has

taken, and will continue to take, all steps to prevent threats to human health and the environment, including compliance with all applicable interim status requirements, the Regional Administrator may approve an extension to this one-year limit; or

(ii) For units meeting the requirements of § 265.113(d), no later than 30 days after the date on which the hazardous waste management unit receives the known final volume of non-hazardous wastes, or if there is a reasonable possibility that the hazardous waste management unit will receive additional non-hazardous wastes, no later than one year after the date on which the unit received the most recent volume of non-hazardous wastes. If the owner or operator can demonstrate to the Regional Administrator that the hazardous waste management unit has the capacity to receive additional non-hazardous wastes and he has taken, and will continue to take, all steps to prevent threats to human health and the environment, including compliance with all applicable interim status requirements, the Regional Administrator may approve an extension to this one-year limit.

(3) The owner or operator must submit his closure plan to the Regional Administrator no later than 15 days after:

(i) Termination of interim status except when a permit is issued simultaneously with termination of interim status; or

(ii) Issuance of a judicial decree or final order under section 3008 of RCRA to cease receiving hazardous wastes or close.

(4) The Regional Administrator will provide the owner or operator and the public, through a newspaper notice, the opportunity to submit written comments on the plan and request modifications to the

plan no later than 30 days from the date of the notice. He will also, in response to a request or at his own discretion, hold a public hearing whenever such a hearing might clarify one or more issues concerning a closure plan. The Regional Administrator will give public notice of the hearing at least 30 days before it occurs. (Public notice of the hearing may be given at the same time as notice of the opportunity for the public to submit written comments, and the two notices may be combined.) The Regional Administrator will approve, modify, or disapprove the plan within 90 days of its receipt. If the Regional Administrator does not approve the plan he shall provide the owner or operator with a detailed written statement of reasons for the refusal and the owner or operator must modify the plan or submit a new plan for approval within 30 days after receiving such written statement. The Regional Administrator will approve or modify this plan in writing within 60 days. If the Regional Administrator modifies the plan, this modified plan becomes the approved closure plan. The Regional Administrator must assure that the approved plan is consistent with §§ 265.111 through 265.115 and the applicable requirements of §§ 265.90 *et seq.*, 265.197, 265.228, 265.258, 265.280, 265.310, 265.351, 265.381, and 265.404. A copy of the modified plan with a detailed statement of reasons for the modifications must be mailed to the owner or operator.

(e) *Removal of wastes and decontamination or dismantling of equipment.* Nothing in this section shall preclude the owner or operator from removing hazardous wastes and decontaminating or dismantling equipment in accordance with the approved partial or final closure plan at any time before or after notification of partial or final closure.

§ 265.113 Closure; time allowed for closure.

(a) Within 90 days after receiving the final volume of hazardous wastes, or the final volume of non-hazardous wastes if the owner or operator complies with all applicable requirements in paragraphs (d) and (e) of this section, at a hazardous waste management unit or facility, or within 90 days after approval of the closure plan, whichever is later, the owner or operator must treat, remove from the unit or facility, or dispose of on-site, all hazardous wastes in accordance with the approved closure plan. The Regional Administrator may approve a longer period if the owner or operator demonstrates that:

(1)(i) The activities required to comply with this paragraph will, of necessity, take longer than 90 days to complete; or

(ii)(A) The hazardous waste management unit or facility has the capacity to receive additional hazardous wastes, or has the capacity to receive non-hazardous wastes if the facility owner or operator complies with paragraphs (d) and (e) of this section; and

(B) There is a reasonable likelihood that he or another person will recommence operation of the hazardous waste management unit or the facility within one year; and

(C) Closure of the hazardous waste management unit or facility would be incompatible with continued operation of the site; and

(2) He has taken and will continue to take all steps to prevent threats to human health and the environment, including compliance with all applicable interim status requirements.

(b) The owner or operator must complete partial and final closure activities in accordance with the

approved closure plan and within 180 days after receiving the final volume of hazardous wastes, or the final volume of non-hazardous wastes if the owner or operator complies with all applicable requirements in paragraphs (d) and (e) of this section, at the hazardous waste management unit or facility, or 180 days after approval of the closure plan, if that is later. The Regional Administrator may approve an extension to the closure period if the owner or operator [makes certain showings].

* * * *

Section 271.4 of 40 C.F.R. Part 271, the regulations governing EPA authorization of state hazardous waste programs, provides:

§ 271.4 Consistency.

To obtain approval, a State program must be consistent with the Federal program and State programs applicable in other States and in particular must comply with the provisions below. For purposes of this section the phrase "State programs applicable in other States" refers only to those State hazardous waste programs which have received final authorization under this part.

(a) Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.

(b) Any aspect of State law or of the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State may be deemed inconsistent.

(c) If the State manifest system does not meet the requirements of this part, the State program shall be deemed inconsistent.

Section 3.27.2.24 of the Zoning Regulations of the Town of North Haven, Connecticut, provides:

> No storage of any type, including the temporary or permanent storage of waste products or material shall be permitted outside of an enclosed building without the expressed site plan approval of the Planning and Zoning Commission. In regarding such storage, the Commission shall consider the impact upon the public safety, public health, sanitation and aesthetics. The Commission may prohibit or may regulate such storage including but not limited to the amount, location, enclosure, screening, scheduled removal and the nature of the materials to be stored.

Section 6.1 of the Zoning Regulations of the Town of North Haven, Connecticut, provides:

> No use shall be permitted in any Commercial or Industrial District except [as listed].

* * * *

Supreme Court, U.S.
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No. 90-1471

In The

Supreme Court of the United States

October Term, 1990

THE UPJOHN COMPANY,

Petitioner,

v.

NORTH HAVEN PLANNING AND ZONING COMMISSION and SCOTT SCHATZLEIN,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the decision or record below raises the question presented in the petition.

II. Whether an "approval" under regulations promulgated pursuant to the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.*, of a closure plan chosen by petitioner preempts the respondents' zoning regulations which do not permit landfills or waste piles on the lot where petitioner's chemical manufacturing plant is located.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATUTORY PROVISIONS INVOLVED

In addition to statutory provisions set out by the petitioner, other pertinent statutory and regulatory provisions are set out in the appendix to this brief. Res. App. 1.

STATEMENT OF THE CASE

This case involves a multimillion dollar corporation's creation of an illegal landfill on its property and its *post facto* efforts to circumvent local zoning regulations. Although local zoning regulations prohibit private landfills at the location owned by Upjohn, the petitioner Upjohn, without seeking any zoning authorization, created a 4.25 acre landfill of waste materials on the same lot where it operates a manufacturing plant. Even as Upjohn was promising the local planning and zoning commission that it would remove these materials, it was also, without informing the Commission, seeking environmental permits, required because the landfill contained hazardous wastes, to allow the permanent "capping" of the landfill on the site. Upjohn chose this capping method despite the fact that it knew or should have known that this plan violated local zoning regulations, and despite the existence of other environmentally sound closure methods.

Although the petitioner's self-selected plan complied with environmental standards for the closure of landfills containing hazardous wastes (a fact never disputed by respondents at any point in these proceedings), the landfill itself had from its beginning violated Town zoning regulations governing the *opening* and siting of landfills. The courts below found that the federal Environmental Protection Agency's (EPA) approval of petitioner's closure plan meant only that the plan satisfied environmental regulations (not that the plan was the *most* environmentally protective) and that the approval did not preempt the application of local zoning regulations. The EPA itself disavowed any claim of preemption when it stated, before approving Upjohn's plan, that Upjohn

would have to submit *another* closure plan requiring removal if local zoning authorities were successful in state court litigation concerning the removal of the landfill from this site. Against this background, the Second Circuit, in a *per curiam* opinion, properly rejected Upjohn's preemption argument. No further review is merited here.

A. Federal Legal Framework

The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.*, is often described as a comprehensive "cradle to grave" program to ensure proper handling of hazardous waste. RCRA, however, operates by establishing substantive standards on each *phase* of hazardous waste activities: generation, storage, treatment, transportation and disposal. It does not, except in a rudimentary fashion, regulate the *siting* of hazardous waste facilities, a task that has been left to the states.[1]

---

[1] See, e.g., 42 U.S.C. § 6924(b) (regulating location of hazardous waste in salt dome formations, salt bed formations, underground mines and caves). The EPA has promulgated three location standards pursuant to RCRA; *see* 40 C.F.R. § 264.18; including one concerning 100 year flood planes. 40 C.F.R. § 264.18(b). The landfill at issue is located adjacent to a tidal waterway and is surrounded by the 100 year flood plane area, but apparently satisfies the EPA regulations on this issue.

Petitioner's observation that Congress has utilized CERCLA funding to encourage states to provide hazardous waste sites only confirms that Congress intended siting decisions to be made by the states. Indeed, Connecticut has adopted provisions to regulate the siting of hazardous waste disposal facilities within the state. Conn. Gen. Stat. § 22a-114 *et seq.* (1991). Under Connecticut law, a hazardous waste facility

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While not regulating the location of hazardous waste facilities, RCRA expresses a definite preference for the types of disposal facilities that are most likely to protect the environment and human health and safety. In 1984, Congress, recognizing that landfills, surface impoundments, and other land disposal methods pose significant risks to human health and the environment, amended RCRA to prohibit the land disposal of specified hazardous wastes; see 42 U.S.C. §§ 6924(d) and (e); and also to encourage environmentally sound alternatives to land disposal. 42 U.S.C. § 6902(a)(6).

Under its RCRA authority, the EPA requires that those disposing of hazardous waste must submit a

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may be constructed or modified only if a certificate has been obtained from the Connecticut siting council. The council has "exclusive jurisdiction over the siting of the facilities," and is authorized to "give such consideration to other state laws and municipal ordinances and regulations as it shall deem appropriate." Conn. Gen. Stat. § 22a-124(a). While a municipality may apply its zoning regulations to a proposed facility, its decisions are appealable to the siting council which has authority to overturn local zoning rulings. Conn. Gen. Stat. § 22a-124(b).

The record below does not demonstrate that Upjohn has ever applied for a siting permit under these provisions of the Connecticut General Statutes, perhaps in reliance on a statutory exemption for industries that treat or recover hazardous waste on site as an integral part of an industrial process. Conn. Gen. Stat. § 22a-117(b). Such reliance would be misplaced since Upjohn seeks to dispose of hazardous waste in its illegal landfill rather than treat or recover the waste. Further, the exemption would be inapplicable given Upjohn's stated intention to close its North Haven operations while leaving its landfill permanently at the site. In any event, it is clear that Upjohn in this case seeks to avoid both state and local regulation of the siting of its landfill.

"closure" plan to address the final treatment and disposal of hazardous waste. 40 C.F.R. §§ 265.112(a) and (d), 265.140-.150. The method of closure is not prescribed by the regulations. See 40 C.F.R. § 265.113(a) (closure plan may involve treatment, removal, or onsite disposal of waste). The owner or operator has responsibility for designing the particular plan, 40 C.F.R. § 265.112, which is reviewed by the regional administrator to ensure compliance with certain environmental standards. 40 C.F.R. § 265.112(d)(4). The EPA regulations governing closure plans are not regulations governing the *siting* of hazardous waste facilities; indeed, the "closure" of a land disposal facility logically presumes that the facility has received permission to exist at the location in the first place.

Under EPA regulations, land disposal units include, among other types, "waste piles" and "landfills". See 40 C.F.R. §§ 260.10, 264.250 (waste piles) and 40 C.F.R. § 260.10 (landfill). Although Upjohn's sludge pile could conceivably have been characterized as either a "landfill" or a "waste pile"; see 40 C.F.R. § 260.10 (definition of "landfill" and "pile"); Upjohn chose to classify it as a "landfill," presumably because the closure plan selected by Upjohn would not have been permitted under the regulations governing the closure of "waste piles."[2]

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[2] EPA closure regulations require removal or decontamination of waste piles. 40 C.F.R. § 264.258(a).

B. Factual Background

Since 1962 the Upjohn Company has operated a chemical manufacturing plant in North Haven, Connecticut. Pet. App. 5a. The plant is located adjacent to a tidal waterway (the Quinnipiac River) and has immediate access to a major interstate highway (I-91). *Id.*

In 1979, the North Haven Planning and Zoning Commission (Commission) became aware that Upjohn had been stockpiling "sludge," a by-product of its waste treatment process, on its site. Pet. App. 5a; Joint Appendix in Court of Appeals ("JA") 458. Because the North Haven Zoning Regulations do not allow the permanent storage of waste materials at this location, the Commission began discussions with Upjohn regarding the removal of the sludge.[3] Pet. App. 7a-8a; JA 458; Record before Court of

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[3] The application of the North Haven zoning regulations to Upjohn's landfill has been the subject of state court lawsuits, which have upheld the Commission's determination that the landfill at this site violates the zoning regulations. The reasons for this determination have been set forth most recently in *Upjohn Company v. Planning and Zoning Comm'n of North Haven*, No. CV 90-305776 S (Conn Super. Ct., Jud. Dist. of New Haven March 25, 1991), where the court explained:

> Pursuant to Section 6 of the North Haven zoning regulations, the Commission determined that Upjohn's site was, at the time of the applications, in an industrial district. The permitted uses for such a district are restricted to those indicated by check marks in a table of permitted uses for the various zones. Pursuant to Section 6 "[n]o use shall be permitted in any Commercial or Industrial District except one which is indicated by a check mark

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Appeals ("Record"), Plaintiffs' Ex. 24, 25. At a meeting with the Commission in 1979, Upjohn responded to these concerns by representing that it was attempting to reduce the amount of sludge generated and was also investigating a technology that would allow the sludge to be thickened and removed off site. JA 457-58. The Commission

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> . . . applicable to the district in which such use is located." The permitted uses set forth in §§ 6.1.1.-6.1.74, for the district in which Upjohn's property is located do not include a landfill or storage of sludge or chemical waste.
>
> The evidence on the record supports the determination that the maintenance of a four-acre sludge pile does not constitute an accessory use pursuant to § 6.1.71 of the regulations, which permits "accessory uses customarily incidental to a permitted use on the same premises." If the permanent storage of waste produced by a permitted use were construed to be an accessory use, each and every household and business that produced trash or debris would be entitled to maintain a permanent landfill on its premises. Since several of the explicitly permitted uses enumerated in Section 6 of the zoning regulations concern storage of various substances, long term storage of waste in bulk cannot logically be viewed as a generally authorized accessory use. (See §§ 6.1.55, 6.1.65, 6.1.66, 6.1.67, 6.1.72).

Resp. App. 25-26. *See also Upjohn Co. v. North Haven Zoning Board of Appeals*, No. CV-86-0250632-S at 15-17 (Conn. Super. Ct., Jud. Dist. of New Haven February 21, 1991) (construing North Haven zoning regulations to the same effect).

It should be noted that the pertinent North Haven zoning regulations predate the landfill and that Upjohn, a multimillion dollar corporation, had actual or constructive knowledge of these provisions at the time it began the creation of this landfill.

had further interactions with Upjohn regarding the sludge over the next few years, JA 459-466, 472, and in 1983, the Commission required Upjohn, as a condition to approving permits relating to its waste treatment process, to submit a timetable for removing the sludge pile on the site. Pet. App. 8a. After no action was taken by Upjohn to comply with this requirement, the Commission in 1985 again requested Upjohn to submit a plan for sludge removal. JA 563. Upjohn responded that it was still investigating possible uses for the sludge, but that it would dispose of the 4.25 acre 40 foot pile of sludge at the rate of 1 truckload a week. Pet. App. 8a; JA 563. At a later meeting with the Commission, an Upjohn representative indicated that Upjohn was committed to removing the sludge from the site, and that sludge could be removed at a rate of 3 to 4 truckloads a week. JA 485, 569. In the meantime, Upjohn continued to add sludge to its landfill. It stopped only in 1985 after the pile collapsed because Upjohn had added a substantial amount of material that had insufficient time to dry. Pet. App. 6a. The collapse caused damage to water treatment devices on the property. *Id.* Since the collapse, the additional sludge produced by Upjohn has been trucked off site. JA 96-97.

While Upjohn was representing to the Commission in 1985 that it was committed to the removal of the sludge pile, it was simultaneously beginning the process of seeking approvals from state and federal environmental authorities to "cap" the pile and leave it permanently on the site. JA 334; Pet. App. 9a. Although Upjohn's plans to "cap" the site contradicted what it had represented and was representing to the Commission, it never informed the Commission of its communications with state and

federal environmental authorities. The Commission only learned of these developments from an outside source. JA 407. Thereafter the Commission, which had restrained from taking further formal actions against Upjohn on the belief that Upjohn was acting in good faith, issued a cease and desist order in 1986 requiring removal of the pile. Pet. App. 8a. Upjohn appealed this order first to the North Haven Zoning Board of Appeals and then to the Connecticut Superior Court, which recently dismissed the appeal and upheld the cease and desist order. *Upjohn Company v. North Haven Zoning Board of Appeals*, No. CV 86-0250632 S (Conn. Super. Ct., Jud. Dist. of New Haven February 21, 1991).[4] Upjohn has sought further review of that decision in the Connecticut Appellate Court.

On September 29, 1989, the Connecticut Department of Environmental Protection (DEP) and EPA issued an "approval" of Upjohn's closure plan, JA 655-56, which Upjohn immediately and unilaterally began to implement. JA 6-7, 14. In January 1990, Upjohn announced its decision to close its North Haven manufacturing facility, Pet. App. 10a, intending to leave behind permanently its 4.25 acre, 40 foot high landfill.

C. Proceedings Below

1. District Court Proceedings

After Upjohn received its approval from the DEP and EPA, it announced that it would immediately begin work to cap the site pursuant to its closure plan. JA 6-7, 14.

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[4] Upjohn has represented that it has lodged ten copies of this decision with the Clerk of the Court. Pet. Brief, p. 8 n.5.

Although the capping plan involved excavation and fill activities for which zoning permits and site plan approval were needed, Upjohn failed to apply for such permits and approval. Pet. App. 10a. Shortly thereafter, the Commission and its Zoning Enforcement Officer filed this action in Connecticut Superior Court seeking to enjoin Upjohn from implementing the closure plan, and seeking also to compel Upjohn to bring its property into conformity with the zoning regulations. Pet. App. 4a. Upjohn removed this action to the United States District Court for the District of Connecticut and filed a counterclaim in which it sought to enjoin the Commission and its Zoning Enforcement Officer from enforcing any order or regulations that would require Upjohn to remove the sludge pile from the premises or would prevent Upjohn from implementing the closure plan. Pet. App. 4a-5a. After a four day trial, the district court held that the DEP/EPA approval of the capping plan did not preempt the application and enforcement of the North Haven Zoning Regulations or enforcement orders by the Zoning Enforcement Officer.[5] Pet. App. 21a. Upjohn had claimed that the

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[5] The district court abstained from deciding whether the landfill itself violated the zoning regulation. Pet. App. 12a. The parties had litigated this issue before the court, with Upjohn claiming that the landfill was an accessory use to its manufacturing plant, and the Commission claiming that the permanent storage of 4.25 acres of waste could not be considered an accessory use. Pet. App. 10a. The district court's abstention was based in part on pending state law questions on this issue, and the decision to abstain has not been challenged by Upjohn in its petition for writ of certiorari. State courts have subsequently decided the zoning issue, finding that the landfill violates the zoning regulations. *See supra* note 3.

DEP/EPA approval preempted the application of local zoning regulations because it was impossible to comply with both the regulations, requiring removal, and the "approval", requiring capping on the site. The district court rejected this argument, finding that the "approval" simply meant that the plan satisfied regulations, and did not constitute either an order to cap the pile or a preference of this plan over other closure options. The court stated:

> Upjohn's argument that the Approval constitutes an EPA determination that Upjohn's plan represents the most sound environmental action, and therefore any obstacle to its implementation is an obstacle to congressional goals is also not persuasive. There are many methods in which a hazardous waste site might be closed in accordance with RCRA, including removal. See 40 C.F.R. § 265.113(a). The language of the Approval contains no indication that the EPA or DEP has determined that this method of closure is the most environmentally protective. See Def's exh. 524. Furthermore, the conclusion that the EPA and DEP simply determined that federal and state standards were satisfied by the plan is supported by the fact that these agencies issued an Approval, rather than an order. Indeed, in a different context the defendant points out that the EPA had the power to issue an order requiring Upjohn to remove the material. . . . The Court also notes that the language of the Approval itself includes that it does not relieve Upjohn from obtaining any further authorizations required by the Connecticut General Statutes, which provide for the enactment of local zoning regulations. CONN. GEN. STAT. §§ 8-1,8-2.

Pet. App. 20a-21a. The court also relied on the fact that the RCRA savings clause, 42 U.S.C. § 6929, clearly provided a role for local government, thereby further exhibiting a congressional purpose not to exclude local regulation. Pet. App. 21a.

2. The Court of Appeals Decision

In a *per curiam* opinion, the Second Circuit affirmed the judgment of the district court. The court made note of the savings clause, whereby Congress explicitly stated that state and local governments were authorized to adopt regulations, including regulations for site selection, that are more stringent than EPA regulations adopted under RCRA. Pet. App. 2a. Like the district court, the Second Circuit observed that the "approval" by its very terms did *not* relieve Upjohn from its obligation to obtain other authorizations required by provisions of the Connecticut General Statutes. As the court noted, the Connecticut General Statutes delegate zoning authority to local municipalities. *Id.* The court also referred to the EPA's own position, as reflected in its response to public comments on the closure plan, that, if in a pending lawsuit the Town were successful in upholding the order to remove the landfill from this site, Upjohn would have to submit an alternate closure plan for review and approval. *Id.*, at 2a-3a. Based on the EPA's own position as well as these other matters, the Second Circuit found that federal law and regulatory actions do not preempt the Town's zoning regulations. *Id.*, at 3a.

REASONS FOR DENYING THE PETITION

I. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTION PRESENTED IN THE PETITION

The sole question presented by the petitioner is whether, consistent with RCRA:

> a local government may ban disposal of locally generated hazardous waste within its borders, even though the federal Environmental Protection Agency has approved a local disposal plan as safe and the local government has not established that the plan is unsafe.

Brief for Petitioner at (i). The Second Circuit, however, was never asked to address the question of a local "ban" of the disposal of hazardous waste. Moreover, the record below does not support a determination of that question by this Court. The petitioner, in short, has recast both law and facts to pose a question that was not presented to either the district court or the Second Circuit.

In the proceedings below, the two principal issues were (1) whether Upjohn's sludge pile was allowed, under the North Haven Zoning Regulations, at this site, and (2) if not, whether the application of those zoning regulations was preempted by the EPA/DEP "approval". See Pet. App. 10a (discussing claims raised by parties in district court). Upjohn simply never raised, and the courts below never considered, whether North Haven had imposed a town-wide ban of hazardous waste disposal facilities or whether such a ban would be

permissible.[6] The issue of a town-wide ban of hazardous waste – as opposed to a prohibition of a landfill at this location – was never raised below, presumably because Upjohn never intended to have the landfill located anywhere other than where it had (illegally) put it. Had the ban issue been raised, the Town could have addressed it factually and legally.[7]

The relevant zoning regulations at issue concern not a town-wide "ban" of hazardous waste disposal, but a prohibition of the on-site permanent disposal of waste.

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[6] *See* Upjohn's Proposed Findings of Fact and Conclusions of Law, dated January 31, 1990, filed with the district court after the close of evidence (town-wide "ban" issue never discussed). It is apparent that Upjohn has simply adopted a new case theory for the first time in its petition for certification. At trial Upjohn argued that the Commission's regulations were preempted because, it claimed, the "approval" was tantamount to an order, and Upjohn could not both cap the pile, as required by the order, and remove the pile from the site, as required by the Commission. The courts below rejected this claim, finding that the approval was not an order, and was not intended to preempt local zoning regulations. Upjohn now appears to have abandoned this theory in favor of the "town-wide ban" theory – a theory that was never developed factually or legally in the courts below and that has never been disclosed to the Commission before the filing of this petition.

[7] Drawing an inference from perceived silence by the Town, Upjohn asserts "There can be little doubt that the ban in this case is, in fact, a ban." Petition, 21 at n.22. This statement, and the corresponding lack of evidence, only highlights how this issue has not been addressed below. Indeed, although the parties did not argue or brief the issue at the district court, that court nevertheless found in passing that the Town has *not* banned disposal activity within the Town. Pet. App. 20a.

See supra note 3 (discussing zoning basis for denial of landfill at this site).[8] At no point in these proceedings has Upjohn challenged the validity of this restriction. Nor could it reasonably do so: not only does the on-site disposal of waste create nuisance problems, it also detracts from the value of the land and restricts both present and future uses of the site.[9] Here, Upjohn has taken a parcel abutting a significant tidal waterway with immediate access to a major interstate highway and, in blatant violation of the Town's zoning regulations, converted a portion of this lot into a landfill. Upjohn has fabricated a new issue of a "town-wide ban" that has nothing to do with the particular regulations that require removal of the sludge pile from the site.

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[8] The regulations at issue do not distinguish *hazardous* waste from other types of waste. *See supra* note 3. *See also*, Dist. Court Opinion, Pet. App. 18a ("The North Haven zoning regulations at issue, . . . do not specifically address *hazardous* waste storage or disposal"). Indeed, this whole case amounts to a claim for special treatment by Upjohn simply *because* its illegal landfill contains hazardous waste.

[9] Upjohn states that "[t]he Town has never suggested that Upjohn's pile poses problems unique to its site . . . ," ignoring the fact that the issue litigated in the district court was whether, under the North Haven zoning regulations, the landfill constituted an accessory use to Upjohn's chemical plant, and not whether, as a matter of zoning policy, Upjohn's landfill should be allowed at this site. Even so, the testimony of the former North Haven Zoning Enforcement Officer on the issue of accessory use suggests some of the wider zoning concerns involved when on-site waste storage is permanently allowed on lots in conjunction with other uses:

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Accordingly, because the record below lacks the factual and legal basis necessary to review the question posed by Upjohn, the petition should be denied.

II. THE NORTH HAVEN ZONING REGULATIONS PROHIBITING THE UPJOHN LANDFILL ARE NOT PREEMPTED BY THE APPROVAL BY THE EPA OF THE CLOSURE PLAN CHOSEN BY UPJOHN.

The issue of a "town-wide ban" promulgated by the North Haven zoning regulations was not raised below,

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> Well, as a zoning enforcement officer and someone who has studied planning and zoning an accessory use is one which is dependent, which is minor, which is subordinate to the main use, would be an accessory. It is not a primary use of the site. The storage of waste on the site, the permanent storage of waste is not considered an accessory use. Perhaps the manufacture of waste could be considered an accessory use, but not the outside storage and disposal of waste on site. There is no other site in the Town of North Haven that does this. They all remove their waste, no matter what type of waste it is, to other sites.
>
> And what concerns me as a zoning person is that the sludge pile will become the primary use of this site if Upjohn moves, and what they are contemplating as an accessory use will become a primary use, and the entire use of that property and the value of the land is gone. And the purpose of Planning and Zoning is to always consider the highest and best use of the property, and to have a four acre sludge pile which has been a violation on this site cannot be construed as an accessory use.

JA 53-54.

and therefore the sole question presented by Upjohn in its petition is not appropriate for review by this Court. What the courts below did decide is that neither RCRA nor the EPA approval preempted the pertinent provisions of the North Haven zoning regulations. This conclusion is correct.

Under the Supremacy Clause, federal law may preempt state and municipal law in several different ways. *See generally Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712-13 (1985). First, Congress may preempt state or local law by so stating in express terms. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Second, in the absence of express preemptive language, preemption will be applied where federal legislation is so comprehensive in a given area as to leave no room for supplemental state or local legislation. *International Paper, Co. v. Ouellette*, 479 U.S. 481, 491 (1987). Finally, even if Congress has not displaced state or local action in an area, state or local law is displaced to the extent that it actually conflicts with federal law or with congressional purposes and goals. *Hillsborough Co. v. Automated Medical Laboratories, Inc., supra*. Such a conflict occurs when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes of Congress. *Id.*

Upjohn makes no claim that the zoning regulations and the Commission's orders are preempted under either of the first two methods, i.e., express preemption or total occupation of the subject matter. Nor could it reasonably make such a claim. Congress explicitly acknowledged in RCRA that "the collection and disposal of solid waste

should continue to be primarily the function of state, regional and local agencies." 42 U.S.C. § 6901(a)(4). In addition, in 42 U.S.C. § 6929, Congress explicitly provided that "nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations." In addition, this Court has explicitly rejected the claim that RCRA was intended to preempt the entire field of interstate waste management. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 620 n.4 (1978).

Rather, Upjohn claimed below that the Commission's regulations and its actions are preempted under the third method of preemption, i.e., because the zoning regulations and the Commission's order stand as an obstacle to the full purposes and objectives of Congress, as set forth in RCRA. This claim is wholly without merit.

First, nothing in either RCRA or the pertinent EPA closure regulations suggests any intent to preempt state or local land use decisions regarding the siting of landfills containing hazardous waste.[10] As stated above, RCRA itself contains only minimal siting criteria, and the RCRA savings clause explicitly singles out "site selection" requirements as subjects to be regulated by state or

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[10] Here, of course, the pertinent regulations concern the permanent on-site storage of waste, and do not distinguish hazardous wastes from other kinds of wastes. *See, supra* notes 3 and 8.

local governments.[11] Likewise, the pertinent EPA regulations governing closure of landfills govern just that: the *closure*, not the opening or siting of landfills. Furthermore, the EPA regulations require only that closure plans satisfy *environmental* concerns, and do not address land use concerns. 40 C.F.R. § 265.112(d)(4). Compare Conn. Gen. Stat. § 22a-122(b) (1991) (Connecticut Siting Council specifically authorized to consider environmental factors as well as "local and regional land use plans and regulations" when reviewing applications for the siting of a hazardous waste disposal facility). Thus, where neither RCRA nor EPA closure regulations exhibit any intent to regulate siting or land use decisions, and where a state procedure exists to provide safeguards against unjustified local opposition to proposed hazardous waste sites, local land use regulation of hazardous waste sites cannot be deemed to be an obstacle to the purposes and objectives of Congress.

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[11] Petitioner has referred to the 1986 amendment to CERCLA, contained at 42 U.S.C. § 9604(c)(9), in which Congress declared that no superfund money may be spent for remedial actions in states that fail to make arrangements to provide disposal capacity for the hazardous wastes generated in that state. It is questionable what effect this 1986 amendment has on the landfill at issue, which stopped receiving waste in 1985. In any event, this provision, to the extent it has any relevance here, evinces a congressional intent to compel *states* to create an equitable hazardous waste siting procedure. As stated above, Connecticut has adopted legislation creating a statewide siting council with exclusive jurisdiction over siting decisions. The council may overrule local zoning decisions, thereby providing protection from the NIMBY concerns repeatedly referred to by Upjohn. *See supra* note 1. There is no evidence in the record that Upjohn has attempted to utilize this procedure.

Second, as the courts below recognized, the DEP/EPA approval was *not* a determination that the capping method chosen by Upjohn was the *most* environmentally sensitive disposal method under RCRA. See Pet. App. 20a-21a. There is nothing in either RCRA or the DEP/EPA approval that indicates that the action mandated by the Commission (removal from this site) is inconsistent with environmentally safe closure methods. *Id.* Indeed, EPA regulations explicitly allow closure to be accomplished by removal. 40 C.F.R. § 265.113(a).

Furthermore, as noted by the Second Circuit, the EPA itself suggested that Upjohn's closure plan was simply one among many closure options, when it responded to public comments as follows:

> **Public Comment**
>
> Will DEP/EPA require Upjohn to submit, along with its pending application for the closure/post-closure plan, a plan indicating how they would remove the sludge pile in the event the pending North Haven Planning and Zoning court action[12] so required?

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[12] The action referred to in this comment is *Upjohn Co. v. North Haven Zoning Board of Appeals*, No. CV 86-0250632 (Conn. Super. Ct., Jud. Dist. of New Haven February 21, 1991), which was the only action between the parties at the time this comment was made. That case concerned the validity of the 1986 cease and desist order requiring Upjohn to remove the landfill from its property. This order was issued by the North Haven Zoning Enforcement Officer, who acts as the agent of the Planning and Zoning Commission; this order was appealed by

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DEP/EPA Response

No. If the final determination from the court upholds the complaint filed by the Planning and Zoning Commission, Upjohn would have to submit *a waste removal closure/post-closure plan* to DEP/EPA for review and approval.

(Emphasis added). JA 603. This response clearly indicates the EPA itself did not intend an approval of this plan to displace any additional requirements imposed by the Commission, provided those requirements were upheld in court.

The language and legislative history of RCRA also support the lower court's conclusion that the DEP/EPA approval of the plan was simply an approval of one method rather than a choice of the most environmentally sensitive method. Upjohn's capping plan is a "land disposal" method of disposing of hazardous waste. Record, Defendant's Ex. 505 (identifying capping plan as complying with EPA land disposal regulations). In the recent amendments to the RCRA, however, Congress has focused on the need to develop environmentally sound *alternatives* to land disposal. 42 U.S.C. § 6901(b)(7) & (8). *See ENSCO, Inc. v. Dumas*, 807 F.2d 743, 744 (8th Cir. 1986) ("Act specifies that its objective will be advanced through encouragement of treatment *in preference to* land disposal

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Upjohn to the North Haven Zoning Board of Appeals, and thereafter to the Connecticut Superior Court. Upjohn's flippant reference to the lawsuit referred to in the comment as a "non-existent lawsuit" is a sorry effort to import confusion to the obvious meaning of the EPA comment.

of hazardous waste . . . ") (emphasis added). One of the express objectives of RCRA, as amended in 1984, is the "minimizing [of] . . . land disposal of hazardous waste by encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment." 42 U.S.C. § 6902(a)(6). In addition, in the 1984 amendments, Congress found that "to avoid substantial risk to human health and the environment, reliance on land disposal should be minimized or eliminated, and land disposal, particularly landfill and surface impoundment should be the least favored method for managing hazardous wastes." 42 U.S.C. § 6901(b)(7). As the conference report on the 1984 legislation explained:

> [T]he Conferees intend that through the vigorous implementation of the objectives of this Act, land disposal will be eliminated for many wastes and minimized for others, and that *advanced treatment*, recycling, *incineration* and other hazardous waste control technologies should replace land disposal.

HR Conf. Rep. No. 98-1133, 98th Cong. 2d Sess. at 80-81, *reprinted in* 1984 U.S. Code Cong. and Ad. News at 5651, quoted in *Ogden Environmental Services v. City of San Diego*, 687 F. Supp. 1436, 1442-43 (S.D. Cal. 1988) (emphasis added).[13] Here, before submitting its closure

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[13] The EPA, like Congress, has recognized the dangers posed by landfill methods of hazardous waste disposal, and has, in fact, candidly acknowledged that all landfills will leak:

> There is good theoretical and empirical evidence that the hazardous constituents which are in place in land disposal facilities very likely will migrate from

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plan, Upjohn considered and priced options, including chemical fixation and incineration, that would minimize the volume of sludge necessary for land disposal. JA 34-35; Record, Ex. 21A, 505. Despite RCRA's preference for methods other than land disposal, however, Upjohn proposed a closure plan consisting of 100% on-site land disposal – undoubtedly because of the lower costs of this plan. Accordingly, neither the language nor legislative history of RCRA supports Upjohn's claim that its land disposal capping method is the most environmentally sensitive disposal method under RCRA for disposing of the sludge pile.

Furthermore, both the DEP and EPA have authority to order Upjohn to adopt a particular course of action; indeed, these agencies issued such an order on Upjohn on the same day they issued their approval of Upjohn's closure plan. JA 53, 602. Record, Plaintiffs' Ex. 6. The fact that these agencies did not *order* Upjohn to adopt its closure plan, and stated that they would merely require Upjohn to submit another plan if required by court action to remove the sludge, indicates that the EPA and DEP did not consider the removal order advocated by the plaintiffs to be a threat to the congressional goals and policies of RCRA. *See Hillsborough County v. Automated Medical*

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> the facility into the broader environment. This may occur several years, even many decades, after placement of the waste in the facility, but data and scientific prediction indicate that, in most cases, even with the application of best available land disposal technology, it will occur eventually.

46 Fed. Reg. 11128 (1981).

Laboratories. Inc., 471 U.S. at 721 (fact that FDA has authority to preempt local ordinance and has not done so indicates that local ordinance is not a threat to federal goals).

Moreover, as RCRA recognizes, the regulation of waste disposal is a traditional state concern. 42 U.S.C. § 6901(a)(4). "Where . . . the field that Congress is said to have preempted has been traditionally occupied by the States 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress'." *Hillsborough County v. Automated Medical Laboratories. Inc.*, 471 U.S. at 715. To prevail here, Upjohn must demonstrate "a conflict between a particular local provision in the Federal scheme, that is strong enough to overcome the presumption that State and local regulation of health and safety matters can constitutionally co-exist with Federal regulation." *Id.* Where the action required by the Commission (removal) is a permitted waste disposal method under RCRA, it cannot be said that the Commission's regulations and orders requiring removal interfere with the Federal goal of the safe disposal of hazardous waste.

III. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS.

The petitioner claims that the Second Circuit's decision affirming a "local ban" of hazardous wastes is in conflict with the decisions by other Federal Courts, particularly the Eight Circuit's decision in *ENSCO, Inc. v.*

Dumas, 807 F.2d 743 (8th Cir. 1986). *See also Ogden Environmental Services, Inc. v. City of San Diego*, 687 F. Supp. 1436 (S.D. Cal. 1988). As stated above, the Second Circuit did not address or decide the issue of a "local ban," and, accordingly these decisions simply have no applicability to the decision below.

ENSCO and *Ogden*, in any event, are radically different from the instant case. First, the federal policies at issue in *ENSCO* and *Ogden* cases are not at issue here. Both *ENSCO* and *Ogden* concern the siting of incineration facilities, which, as both courts emphasized, Congress has explicitly attempted to promote as an alternative to land disposal methods. *See supra* discussion at pp. 21-22. Here, in contrast, Upjohn's proposed capping plan involved a land disposal method, which is actually discouraged by RCRA. *ENSCO*, 807 F.2d at 744.

Second, the ordinances at issue in *ENSCO* and *Ogden* were essentially environmental ordinances regulating the same subject matter as RCRA and the EPA; the courts considered whether the local ordinances constituted efforts to second-guess health and safety issues already considered by the EPA. Here, in contrast, the focus of the North Haven zoning regulations is on *land use* rather than environmental matters. While "[t]he line between environmental regulation and land use planning will not always be bright . . . the core activity described by each phrase is undoubtedly different." *California Coastal Comm'n. v. Granite Rock Co.*, 480 U.S. 572, 587 (1987). "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only

that, however the land is used, damage to the environment is kept within prescribed limits." *Id.* Indeed, Upjohn's whole argument – that the Commission could not prohibit Upjohn's landfill absent a legitimate *environmental* justification – denies *any* independent role to land use (vs. environmental) concerns in the siting of landfills. This claim finds no support in any of the statutory authority or case law cited by Upjohn.

Finally, as the district court pointed out, the local ordinances in *ENSCO* and *Ogden* were enacted *after and in response to* EPA actions. *See ENSCO*, 807 F.2d at 744. Here, in contrast, the Commission found Upjohn to be in violation of the zoning regulations *before* Upjohn even applied for its closure plan, and the relevant regulations predated Upjohn's landfill by many years. Indeed, Upjohn submitted its closure plan to the EPA and DEP despite its knowledge that that proposed capping plan would be inconsistent with the Commission's removal order and despite the fact that EPA regulations provide for closure methods that *are* consistent with the zoning regulations. Thus, unlike *ENSCO* and *Ogden*, the regulations at issue were not enacted to challenge federal authority. JA 21.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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APPENDIX A

STATUTES AND REGULATIONS

42 U.S.C. § 6924. Standards applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities

* * *

(b) Salt dome formations, salt bed formations, underground mines and caves

(1) Effective on November 8, 1984, the placement of any noncontainerized or bulk liquid hazardous waste in any salt dome formation, salt bed formation, underground mine, or cave is prohibited until such time as –

(A) the Administrator has determined, after notice and opportunity for hearings on the record in the affected areas, that such placement is protective of human health and the environment;

(B) the Administrator has promulgated performance and permitting standards for such facilities under this subchapter, and;

(C) a permit has been issued under section 6925(c) of this title for the facility concerned.

(2) Effective on November 8, 1984, the placement of any hazardous waste other than a hazardous waste referred to in paragraph (1) in a salt dome formation, salt bed formation, underground mine, or cave is prohibited until such time as a permit has been issued under section 6925(c) of this title for the facility concerned.

(3) No determination made by the Administrator under subsection (d), (e), or (g) of this section regarding

any hazardous waste to which such subsection (d), (e), or (g) applies shall affect the prohibition contained in paragraph (1) or (2) of this subsection.

(4) Nothing in this subsection shall apply to the Department of Energy Waste Isolation Pilot Project in New Mexico.

* * *

(d) Prohibitions on land disposal of specified wastes

(1) Effective 32 months after November 8, 1984 (except as provided in subsection (f) of this section with respect to underground injection into deep injection wells), the land disposal of the hazardous wastes referred to in paragraph (2) is prohibited unless the Administrator determines the prohibition on one or more methods of land disposal of such waste is not required in order to protect human health and the environment for as long as the waste remains hazardous taking into account –

(A) the long-term uncertainties associated with land disposal,

(B) the goal of managing hazardous waste in an appropriate manner in the first instance, and

(C) the persistence, toxicity, mobility, and propensity to bioaccumulate of such hazardous wastes and their hazardous constituents.

For the purposes of this paragraph, a method of land disposal may not be determined to be protective of human health and the environment for a hazardous waste referred to in paragraph (2) (other than a hazardous

waste which has complied with the pretreatment regulations promulgated under subsection (m) of this section), unless, upon application by an interested person, it has been demonstrated to the Administrator, to a reasonable degree of certainty, that there will be no migration of hazardous constituents from the disposal unit or injection zone for as long as the wastes remain hazardous.

(2) Paragraph (1) applies to the following hazardous wastes listed or identified under section 6921 of this title:

(A) Liquid hazardous wastes, including free liquids associated with any solid or sludge, containing free cyanides at concentrations greater than or equal to 1,000 mg/l.

(B) Liquid hazardous wastes, including free liquids associated with any solid or sludge, containing the following metals (or elements) or compounds of these metals (or elements) at concentrations greater than or equal to those specified below:

(i) arsenic and/or compounds (as As) 500 mg/l;

(ii) cadmium and/or compounds (as Cd) 100 mg/l;

(iii) chromium (VI and/or compounds (as Cr VI)) 500 mg/l;

(iv) lead and/or compounds (as Pb) 500 mg/l;

(v) mercury and/or compounds (as Hg) 20 mg/l;

(vi) nickel and/or compounds (as Ni) 134 mg/l;

(vii) selenium and/or compounds (as Se) 100 mg/l; and

(viii) thallium and/or compounds (as Th) 130 mg/l.

(C) Liquid hazardous waste having a pH less than or equal to two (2.0).

(D) Liquid hazardous wastes containing polychlorinated biphenyls at concentrations greater than or equal to 50 ppm.

(E) Hazardous wastes containing halogenated organic compounds in total concentration greater than or equal to 1,000 mg/kg.

When necessary to protect human health and the environment, the Administrator shall substitute more stringent concentration levels than the levels specified in subparagraphs (A) through (E).

(3) During the period ending forty-eight months after November 8, 1984, this subsection shall not apply to any disposal of contaminated soil or debris resulting from a response action taken under section 9604 or 9606 of this title or a corrective action required under this subchapter.

(e) Solvents and dioxins

(1) Effective twenty-four months after November 8, 1984 (except as provided in subsection (f) of this section with respect to underground injection into deep injection wells), the land disposal of the hazardous wastes referred to in paragraph (2) is prohibited unless the Administrator determines the prohibition of one or more methods of land disposal of such waste is not required in order to protect human health and the environment for as long as the waste remains hazardous, taking into account the

factors referred to in subparagraph (A) through (C) of subsection (d)(1) of this section. For the purposes of this paragraph, a method of land disposal may not be determined to be protective of human health and the environment for a hazardous waste referred to in paragraph (2) (other than a hazardous waste which has complied with the pretreatment regulations promulgated under subsection (m) of this section), unless upon application by an interested person it has been demonstrated to the Administrator, to a reasonable degree of certainty, that there will be no migration of hazardous constituents from the disposal unit or injection zone for as long as the wastes remain hazardous.

(2) The hazardous wastes to which the prohibition under paragraph (1) applies are as follows –

> (A) dioxin-containing hazardous wastes numbered F020, F021, F022, and F023 (as referred to in the proposed rule published by the Administrator in the Federal Register for April 4, 1983), and
>
> (B) those hazardous wastes numbered F001, F002, F003, F004, and F005 in regulations promulgated by the Administrator under section 3001 (40 C.F.R. 261.31 (July 1, 1983)), as those regulations are in effect on July 1, 1983.

(3) During the period ending forty-eight months after November 8, 1984, this subsection shall not apply to any disposal of contaminated soil or debris resulting from a response action taken under section 9604 or 9606 of this title or a corrective action required under this subchapter.

40 C.F.R. § 260.10 Definitions.

When used in Parts 260 through 265 and 268 of this chapter, the following terms have the meanings given below:

* * *

Landfill means a disposal facility or part of a facility where hazardous waste is placed in or on land and which is not a pile, a land treatment facility, a surface impoundment, an underground injection well, a salt dome formation, a salt bed formation, an underground mine, or a cave.

* * *

Pile means any non-containerized accumulation of solid, nonflowing hazardous waste that is used for treatment or storage.

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40 C.F.R. § 264.18 Location standards.

(a) *Seismic considerations.* (1) Portions of new facilities where treatment, storage, or disposal of hazardous waste will be conducted must not be located within 61 meters (200 feet) of a fault which has had displacement in Holocene time.

(2) As used in paragraph (a)(1) of this section:

(i) "Fault" means a fracture along which rocks on one side have been displaced with respect to those on the other side.

(ii) "Displacement" means the relative movement of any two sides of a fault measured in any direction.

(iii) "Holocene" means the most recent epoch of the Quarternary period, extending from the end of the Pleistocene to the present.

(b) *Floodplains.* (1) A facility located in a 100-year floodplain must be designed, constructed, operated, and maintained to prevent washout or any hazardous waste by a 100-year flood, *unless* the owner or operator can demonstrate to the Regional Administrator's satisfaction that:

(i) Procedures are in effect which will cause the waste to be removed safely, before flood waters can reach the facility, to a location where the wastes will not be vulnerable to flood waters; or

(ii) For existing surface impoundments, waste piles, land treatment units, landfills, and miscellaneous units, no adverse effects on human health or the environment will result if washout occurs, considering:

(A) The volume and physical and chemical characteristics of the waste in the facility;

(B) The concentration of hazardous constituents that would potentially affect surface waters as a result of washout;

(C) The impact of such concentrations on the current or potential uses of and water quality standards established for the affected surface waters; and

(D) The impact of hazardous constituents on the sediments of affected surface waters or the soils of the 100-year floodplain that could result from washout.

(2) As used in paragraph (b)(1) of this section:

(i) "100-year floodplain" means any land area which is subject to a one percent or greater chance of flooding in any given year from any source.

(ii) "Washout" means the movement of hazardous waste from the active portion of the facility as a result of flooding.

(iii) "100-year flood" means a flood that has a one percent chance of being equalled or exceeded in any given year.

(c) *Salt dome formations, salt bed formations, underground mines and caves.* The placement of any noncontainerized or bulk liquid hazardous waste in any salt dome formation, salt bed formation, underground mine or cave is prohibited, except for the Department of Energy Waste Isolation Pilot Project in New Mexico.

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40 C.F.R. § 264.258 Closure and post-closure care.

(a) At closure, the owner or operator must remove or decontaminate all waste residues, contaminated containment system components (liners, etc.), contaminated subsoils, and structures and equipment contaminated with waste and leachate, and manage them as hazardous waste unless § 261.3(d) of this chapter applies.

(b) If, after removing or decontaminating all residues and making all reasonable efforts to effect removal or decontamination of contaminated components, subsoils, structures, and equipment as required in paragraph (a) of this section, the owner or operator finds that not all contaminated subsoils can be practicably removed or decontaminated, he must close the facility and perform post-closure care in accordance with the closure and post-closure care requirements that apply to landfills (§ 264.310).

(c)(1) The owner or operator of a waste pile that does not comply with the liner requirements of § 264.251(a)(1) and is not exempt from them in accordance with § 264.250(c) or § 264.251(b) must:

(i) Include in the closure plan for the pile under § 264.112 both a plan for complying with paragraph (a) of this section and a contingent plan for complying with paragraph (b) of this section in case not all contaminated subsoils can be practicably removed at closure; and

(ii) Prepare a contingent post-closure plan under § 264.118 for complying with paragraph (b) of this section in case not all contaminated subsoils can be practicably removed at closure.

(2) The cost estimates calculated under §§ 264.142 and 264.144 for closure and post-closure care of a pile subject to this paragraph must include the cost of complying with the contingent closure plan and the contingent post-closure plan, but are not required to include the cost of expected closure under paragraph (a) of this section.

Conn. Gen. Stat. § 8-1. Zoning commissions. (a) Any municipality may, by vote of its legislative body, adopt the provisions of this chapter and exercise through a zoning commission the powers granted hereunder. On and after July 1, 1974, in each municipality, except as otherwise provided by special act or chapter provision adopted under chapter 99, the zoning commission shall consist of not less than five nor more than nine members, with minority representation as determined under section 9-167a, who shall be electors of such municipality. The number of such members and the method of selection and removal for cause and terms of office shall be determined by ordinance, provided no such ordinance shall designate the legislative body of such municipality to act as such zoning commission, except that (1) in towns having a population of less than five thousand, the selectmen may be empowered by such ordinance to act as such zoning commission, (2) a legislative body which is acting as a zoning commission prior to July 1, 1974, pursuant to an ordinance, may continue to act as such zoning commission if such municipality has initiated a charter revision pursuant to section 7-188, prior to July 1, 1974, which revision proposes to designate such legislative body as the zoning commission, and such charter revision is approved as provided in section 7-191, and (3) a legislative body which is acting as a zoning commission prior to June 17, 1987, pursuant to a special act may continue to act as such zoning commission. The manner for filing vacancies arising from any cause shall be provided by vote of the legislative body.

(b) The zoning commission of any town shall have jurisdiction over that part of the town outside of any city

or borough contained therein except that the legislative body of any city or borough may, by ordinance, designate the zoning commission of the town in which such city or borough is situated as the zoning commission of such city or borough.

Conn. Gen. Stat. § 8-2. Regulations. The zoning commission of each city, town or borough is authorized to regulate, within the limits of such municipality, the height, number of stories and size of buildings and other structures; the percentage of the area of the lot that may be occupied; the size of yards, courts and other open spaces; the density of population and the location of use of buildings, structures and land for trade, industry, residence or other purposes, including water-dependent uses as defined in section 22a-93, and the height, size and location of advertising signs and billboards. Such zoning commission may divide the municipality into districts of such number, shape and area as may be best suited to carry out the purposes of this chapter; and, within such districts, it may regulate the erection, construction, reconstruction, alteration or use of buildings or structures and the use of land. All such regulations shall be uniform for each class of kind of buildings, structures or use of land throughout each district, but the regulations in one district may differ from those in another district, and may provide that certain classes or kinds of buildings, structures or uses of land are permitted only after obtaining a special permit or special exception from a zoning commission, planning commission, combined planning and

zoning commission or zoning board of appeals, whichever commission or board the regulations may, notwithstanding any special act to the contrary, designate, subject to standards set forth in the regulations and to conditions necessary to protect the public health, safety, convenience and property values. Such regulations shall be made in accordance with a comprehensive plan and shall be designed to lessen congestion in the streets; to secure safety from fire, panic, flood and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to a avoid undue concentration of population and to facilitate the adequate provision for transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration as to the character of the district and its peculiar suitability for particular uses and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality. Such regulations shall also encourage the development of housing opportunities for all citizens of the municipality consistent with soil types, terrain and infrastructure capacity. Zoning regulations shall be made with reasonable consideration for their impact on agriculture. Zoning regulations may be made with reasonable consideration for the protection of historic factors and shall be made with reasonable consideration for the protection of existing and potential public surface and ground drinking water supplies. On and after July 1, 1985, the regulations shall provide that proper provision be made for soil erosion and sediment control pursuant to section 22a-329.

Such regulations may also encourage energy-efficient patterns of development, the use of solar and other renewable forms of energy, and energy conservation. The regulations may also provide for incentives for developers who use passive solar energy techniques, as defined in subsection (b) of section 8-25, in planning a residential subdivision development. The incentives may include, but not be limited to, cluster development, higher density development and performance standards for roads, sidewalks and underground facilities in the subdivision. Such regulations may provide for a municipal system for the creation of development rights and the permanent transfer of such development rights, which may include a system for the variance of density limits in connection with any such transfer. Such regulations may also provide for notice requirements in addition to those required by this chapter. No such regulations shall prohibit the operation of any family day care home or group day care home in a residential zone. Such regulations shall not impose conditions and requirements on manufactured homes having as their narrowest dimension twenty-two feet or more and built in accordance with federal manufactured home construction and safety standards or on lots containing such manufactured homes which are substantially different from conditions and requirements imposed on single-family dwellings and lots containing single-family dwellings. Such regulations shall not impose conditions and requirements on developments to by occupied by manufactured homes having as their narrowest dimension twenty-two feet or more and built in accordance with federal manufactured home construction and safety standards which are substantially

different from conditions and requirements imposed on multifamily dwellings, lots containing multifamily dwellings, cluster developments or planned unit developments. Such regulations shall not prohibit the continuance of any nonconforming use, building or structure existing at the time of the adoption of such regulations. Such regulations shall not provide for the termination of any nonconforming use solely as a result of nonuse for a specified period of time without regard to the intent of the property owner to maintain that use. Any city, town or borough which adopts the provisions of this chapter may, by vote of its legislative body, exempt municipal property from the regulations prescribed by the zoning commission of such city, town or borough; but unless it is so voted municipal property shall be subject to such regulations.

Conn. Gen. Stat. § 22a-114. Legislative finding; policy of the state. The general assembly finds that improper management of hazardous wastes has contaminated the water, soil and air of the state thereby threatening the health and safety of Connecticut citizens; that the economic benefits to the state from industry are jeopardized if hazardous waste disposal facilities are not available in Connecticut; that the safe management of hazardous wastes, including state involvement, is mandated by the Federal Resource Conservation and Recovery Act of 1976 (42 USC 6901 et seq.) and implementing regulations; that the siting of hazardous waste disposal facilities is in the best interest of Connecticut's citizens and that the public

should participate in siting decisions. Therefore the general assembly declares that it is the policy of the state to initiate final remedial action by the year 2000 at each hazardous waste disposal site listed on July 3, 1989, on the inventory maintained by the commissioner of environmental protection pursuant to section 22a-133c and to assure the siting of hazardous waste disposal facilities so that the health and safety of Connecticut's citizens and the environmental and economic interests of the state are protected. The purpose of this chapter is to establish a process for the siting of hazardous waste facilities that will protect the health and safety of Connecticut citizens and assure responsible economic development and to have that siting process be at least as strict as that required by federal law.

Conn. Gen. Stat. § 22a-117. Construction or modification of hazardous waste facility. When certificate required. Transfer of certificate. Polychlorinated biphenyls. (a) No person shall commence construction or modification of a hazardous waste facility unless such person has been issued a certificate of public safety and necessity by the council, except as provided in subsection (b) of this section. The permanent members of the council shall determine if any change in the approved design, capacity, process or operation of a hazardous waste facility is a modification as defined by section 22a-115. Any facility for which such a certificate is required shall thereafter be built, maintained and operated in conformity with such

certificate, including all terms, limitations or conditions contained therein.

(b) Sections 22a-114 to 22a-130, inclusive, shall apply to the construction of any hazardous waste facility except existing facilities and to the construction or modification of any hazardous waste facility except: (1) Any facility whose primary business is not disposal, treatment or recovery of hazardous waste but which treats or recovers hazardous waste on site as an integral part of an industrial process as determined by the commissioner; (2) any facility approved by the commissioner designed and operated by or for municipalities pursuant to their obligations under section 22a-220 to provide for solid waste disposal, and (3) any facility used only for the short-term storage of hazardous waste.

(c) No certificate may be transferred without the approval of the permanent members of the council. Any transferee shall comply with the terms, limitations and conditions contained in the certificate. The permanent members of the siting council shall not approve any such transfer if they find that such transfer was contemplated at or prior to the time the certificate was issued and such fact was not adequately disclosed during the certification proceeding, or if they find that the transferee lacks the financial, technical or management capabilities to comply fully with the terms, limitations or conditions of the certificate.

(d) A certificate may be amended as provided in this chapter.

(e) Any application for a permit to store or dispose of polychlorinated biphenyls, for a fee or other consideration, pursuant to sections 22a-454 and 22a-467, pending as of May 28, 1981, or filed prior to July 1, 1981, shall not be acted on by the commissioner but shall be transferred on July 1, 1981, to the council.

(f) The storage or disposal for a fee or other consideration, in excess of the amount stored or disposed of in the normal operation of any facility as of May 28, 1981, is prohibited until regulations concerning the storage or disposal of polychlorinated biphenyls are adopted by the commissioner and such regulations are exempted from preemption by the United States Environmental Protection Agency pursuant to the Federal Toxic Substance Control Act of 1976, (15 USC 2601 et seq.). This subsection prohibits the otherwise regulates the manner and method of disposal of polychlorinated biphenyls within the meaning of said federal act. Upon adoption of such regulations and exemption from preemption by the United States Environmental Protection Agency, the storage or disposal of polychlorinated biphenyls for a free or other consideration shall not be allowed except in accordance with a certificate of public safety and necessity issued under the provisions of this chapter.

Conn. Gen. Stat. § 22a-122. Decision and opinion. Criteria for decision. Findings and determination. Financial responsibility. Service and publication. Appeal.

* * *

(b) In making its decision, the council shall consider: (1) The impact of the proposed facility on the municipality and affected geographic area in which it is to be located in terms of public health, safety and welfare including but not limited to (A) the risk and impact of accident during transportation of hazardous waste, (B) the risk and impact of fires or explosions from improper storage or disposal methods, (C) consistency of the proposed facility with local and regional land use plans and regulations and the state conservation and development plan in effect at the time the applicant applies to the commissioner of environmental protection for the environmental licenses, permits, or approvals necessary to construct and operate the facility, and with existing and proposed development in the area, (D) the protection of the public from adverse impacts including but not limited to adverse economic impacts of the facility during its construction and operation and after its operation life, (E) the risk and impact on public and private drinking water supplies; (2) the population density in the areas of proposed facility and its proximity to residential areas; (3) data available under the Superfund Amendments and Reauthorization Act of 1986 concerning permitted and illegal discharges in the geographical area affected by the proposed facility; (4) the proximity of the proposed facility to schools; (5) the availability of other sites and (6) other criteria consistent with the goal of insuring the maximum safety of the public from potential dangers

associated with the siting and the development and management of construction of hazardous waste facilities which may be established by regulation adopted by the permanent members of the council in accordance with the provisions of subsection (c) of section 22a-116. The permanent members of the council shall adopt regulations in accordance with the provisions of said chapter establishing minimum distances between the active parts of the facility and other land uses.

Conn. Gen. Stat. § 22a-124. Exclusive jurisdiction of board. Municipal regulation of proposed location. Appeal of zoning decision. (a) Notwithstanding any other provision of the general statutes, the council shall have exclusive jurisdiction over the siting of facilities subject to the provisions of this chapter. In ruling on applications for certificates for facilities, the council shall give such consideration to other state laws and municipal ordinances and regulations as it shall deem appropriate. Whenever the council issues a certificate of public safety and necessity pursuant to this chapter, such certificate shall satisfy and be in lieu of all other certificates, licenses, permits or approvals, or other requirements of state or municipal agencies in regard to any question of public safety and necessity.

(b) A proposed hazardous waste facility may be regulated and restricted by any town, city or borough pursuant to chapters 124 and 126 and by any municipality pursuant to sections 22a-42 and 22a-42a. The applicant shall apply for any permits required by such

agencies at the same time as the filing of the application with the council. Such local bodies may make all decisions necessary to the exercise of such power to regulate and restrict, which decisions shall be made within one hundred thirty days of any application notwithstanding any other statute to the contrary and shall be in writing and recorded in the records of their respective communities, and written notice of any decision shall be given to each party affected thereby. Each such decisions shall be subject to the right of appeal within thirty days after the giving of such notice by any party aggrieved to the council, which shall have exclusive jurisdiction, in the course of any proceeding on an application for a certificate or otherwise, to affirm, modify or revoke such order to make any decision in substitution thereof by a vote of eight of the members of the council. Appeal of a local zoning decision to the council shall be in lieu of any other appeal authorized by the general statutes.

APPENDIX B

NO. 30 57 76	)	SUPERIOR COURT
THE UPJOHN COMPANY	)	JUDICIAL DISTRICT OF NEW HAVEN
V.	)	
THE PLANNING & ZONING COMMISSION OF THE TOWN OF NORTH HAVEN	)	MARCH 25, 1991

MEMORANDUM OF DECISION

The plaintiff, The Upjohn Company ("Upjohn") appeals from the decision of the defendant, the Planning and Zoning Commission of the Town of North Haven ("Commission") denying its applications for approval of a site improvement plan and of a coastal site plan and for issuance of an excavation permit and a fill permit. All of the approvals sought by Upjohn related to its implementation of a plan to install a permanent cap on an existing pile of chemical sludge on its property at 410 Sackett Point Road in North Haven and to "close" the sludge pile in a manner which would leave the pile permanently on the site.

The court finds that Upjohn, as the owner of the property and applicant for the approvals and permits, has established aggrievement.

Upjohn filed its applications on August 8, 1990, and the Commission held a public hearing to consider them on September 10, 1990. The Commission voted to deny each of the applications stating as its reason that the existence of the sludge pile to which the applications

related constituted an ongoing zoning violation on the premises. Notice of the Commission's decision was published in the New Haven Register on September 19, 1990, and this appeal from the denial of its applications was timely filed by Upjohn.

Upjohn claims that the Commission acted arbitrarily, capriciously and in excess of its statutory powers in the following respects:

1. The outside disposal of solid sludge waste is an accessory use incidental to its chemical manufacturing business and is a permitted use in the Industrial District IG-80 zone in which the property is located and therefore did not constitute a zoning violation as claimed by the Commission.

2. The closure for the hazardous waste at issue was approved by state and federal environmental regulatory agencies and such approval preempts enforcement of North Haven's zoning regulations.

3. The applications met all the legal requirements and the Commission acted in excess of its statutory authority in denying them on the basis of a finding of an existing zoning violation on the premises.

4. The Commission failed to consider the beneficial effects of the closure plan as required by §§22a-92 and -106 C.G.S.

5. The finding that the sludge pile constituted a zoning violation was not supported by reliable, probative and substantial evidence in the record and Upjohn was not advised that the Commission would consider this and was thereby deprived of an opportunity to present evidence to rebut this finding.

I NOTICE

The public hearing on Upjohn's applications opened with an explanation by Upjohn of its reasons for seeking permits for interim closure of the sludge pile that had in fact already been accomplished (Doc. 21, p. 16-17) and for further work to achieve final closure of the pile. Early in the hearing, the Town Counsel, Robert Ciulla, reminded the Commission of the history of the sludge pile, noting that in 1983 the Commission had determined that the pile constituted a zoning violation and should be removed from the site (Doc. 21, pp. 18-20). Attorney Ciulla stated that Upjohn was taking the position that the sludge pile was an accessory use to its chemical manufacturing facility and that the Commission had in past litigation taken the position that the maintenance of a sludge pile covering four acres of the site was not an accessory use but constituted a use not authorized by the zoning regulations (Doc. 21, pp. 26-27). Attorney Ciulla told the Commission that granting the permits to close the pile would be a reversal of the positions taken by the Commission in three pending administrative appeals and in an injunction action that had been instituted by the Town and pursued to conclusion in United States District Court.

This preamble, along with its own familiarity with the position taken by the Commission since 1983, put Upjohn on notice that in reviewing its application the Commission would consider the maintenance of the sludge pile to be a violation. Upjohn was provided with a further opportunity to be heard (Doc. 21, p. 56) and introduced no evidence to contradict Attorney Ciulla's admonition that the maintenance of the pile could be

considered a zoning violation. Rather, Upjohn's spokesperson, Attorney Parese, invited the Commission to "decide the application before you this evening on the basis of the regulations of this Commission . . . " (Doc. 21, p. 57).

Upjohn has cited no authority in support of its contention that a zoning authority must identify in advance the ground upon which it ultimately denies an application. Even if such a proposition were accepted, the record indicates that Upjohn was well aware, both because of Attorney Ciulla's remarks and because of the Commission's position in *Upjohn v. North Haven Planning and Zoning Commission*, Docket No. 250632 (Superior Court for New Haven Judicial District at New Haven), which was pending at the time of the applications at issue here, that the Commission considered the sludge pile a use not authorized by the zoning regulations. Upjohn had ample opportunity to present any evidence to establish that the use was in fact a permitted accessory use but did not do so.

There is no merit to Upjohn's claim that it was denied an opportunity to address the consideration on which the Commissioner based its denial of the applications.

II THE COMMISSION'S DETERMINATION

A planning and zoning commission acts in an administrative capacity when, upon considering a permit application, it determines whether the applicant's proposed use is one which satisfies the standards set forth in the zoning regulation. *Norwich v. Norwalk Silbert Vault Co.*, 208 Conn. 12 (1988); *Conto v. Zoning Commission*, 186

Conn. 106, 111 (1982); *Goldberg v. Zoning Commission*, 173 Conn. 23, 25 (1977).

Where a zoning authority has stated its reasons for denial of an application for site plan approval, the reviewing court must determine whether the assigned grounds are reasonably supported by the record and whether they are pertinent to the considerations which the authority was required to apply under the zoning regulations. *Goldberg v. Zoning Commission, supra*, at 25-26; *DeMaria v. Planning and Zoning Commission*, 159 Conn. 534, 540 (1970).

A zoning commission may resort to and rely on a town zoning map, *Burnham v. Planning and Zoning Commission*, 189 Conn. 261, 267 (1983), and the record supports the Commission's determination that a waste pile of four acres (denominated a "landfill" in Upjohn's application, Doc. 26, DD 1826-A) was not a permitted use in the zone in which the Upjohn property is located.

Pursuant to Section 6 of the North Haven zoning regulations, the Commission determined that Upjohn's site was, at the time of the applications, in an industrial district. The permitted uses for such a district are restricted to those indicated by check marks in a table of permitted uses for the various zones. Pursuant to Section 6 "[n]o use shall be permitted in any Commercial or Industrial District except one which is indicated by a check mark . . . applicable to the district in which such use is located." The permitted uses set forth in §§6.1.1-6.1.74, for the district in which Upjohn's property is located do not include a landfill or storage of sludge or chemical waste.

The evidence on the record supports the determination that the maintenance of a four-acre sludge pile does not constitute an accessory use pursuant to §6.1.71 of the regulations, which permits "accessory uses customarily incidental to a permitted use on the same premises." If the permanent storage of waste produced by a permitted use were construed to be an accessory use, each and every household and business that produced trash or debris would be entitled to maintain a permanent landfill on its premises. Since several of the explicitly permitted uses enumerated in Section 6 of the zoning regulations concern storage of various substances, long term storage of waste in bulk cannot logically be viewed as a generally authorized accessory use. (See §§6.1.55, 6.1.65, 6.1.66, 6.1.67, 6.1.72).

The Commission acted within its discretion in determining that establishment of a four-acre landfill for chemical waste was not an accessory use within the standard of *Lawrence v. Zoning Board of Appeals*, 158 Conn. 509, 512-13 (1969). Upjohn has not demonstrated that the conclusion of the zoning authority that the sludge pile was not a permitted use or an accessory use is not reasonably supported by the record or that the Commission acted illegally, arbitrarily or in abuse of its discretion in so finding. *Beit Havurah v. Zoning Board of Appeals*, 177 Conn. 440 (1979).

Upjohn claims that the Commission exceeded its powers by failing to grant its applications on the basis of their facial compliance with Section 8 of the zoning regulations and by denying them for reasons related to the use of the improvements rather than restricting its inquiry to the technical correctness of the plans.

Section 8.3 of the zoning regulations provides that

> The Commission in considering and reviewing the application and in arriving at its decision shall be guided by and take into consideration the public health, safety, general welfare and general effect of the same on the neighborhood, the duration of operations, future usefulness of the premises, the impact of vehicular traffic in the area, and such other factors as may bear upon or relate to the coordinate adjusted and harmonious physical development of the Town of North Haven.

Where excavation permits and other approvals are sought in order to establish or continue a use that is not permitted under the zoning regulations, the commission is plainly warranted to deny them pursuant to the standard set forth in §8.3 of the regulations, since enforcement of the limitations upon uses of land for various zones is indisputably a method of addressing the considerations set forth above.

The situation at issue here is entirely distinguishable from the denials which this court disapproved in *Upjohn Company v. North Haven Planning and Zoning Commission*, Docket No. 280709 (Superior Court for the New Haven Judicial District at New Haven, February 22, 1991). In that prior appeal, the Commission cited the existence of the sludge pile as a zoning violation as a reason for denying permission for site improvements unrelated to the sludge pile. Here, all of the applications were in aid of Upjohn's purpose of making the sludge pile a permanent use on the property, and the Commission was within its discretion in denying permission for activities directly related to maintaining an illegal use of the property.

EPA/DEP APPROVAL OF CLOSURE

Upjohn contends that because state and federal environmental authorities approved its plan to cope with the sludge pile by closing it on site, the Commission is precluded from refusing to grant permits to effectuate such closure.

Upjohn's claim of preemption is not supported by any showing that the federal and state environmental authorities have ever ruled that capping the pile is the only environmentally sound means of addressing it and there is therefore no basis for a finding that enforcement of zoning regulations is in direct conflict with an enforcement action of these agencies. In *North Haven Planning and Zoning Commission v. Upjohn Company*, 921 F.2d 32, 28 (2d Cir. 1990), the U.S. Court of Appeals for the Second Circuit upheld a federal trial court determination that the federal Resource Conservation Recovery Act (RCRA) did not preempt local zoning regulations with regard to the sludge pile and noted that "EPA and DEP responded to public comments and questions by stating that if the Connecticut courts upheld a ruling that Upjohn's current plan [closure] would violate zoning regulations, Upjohn would have to submit to EPA and DEP a new plan for review and approval." *Id.*

Upjohn's reliance on *Ensco Inc. v. Dumas*, 807 F.2d 743 (8th Cir. 1986) is misplaced. In that case, the municipality enacted an ordinance after and in conflict with an EPA plan for the incineration of certain waste at the kind of facility already existing in the municipality. In *Ogden Environmental Services v. City of San Diego*, 687 F. Supp.

1436, 1445 (S.D.Cal. 1988), on which Upjohn relies, the court noted that RCRA did not preempt the municipal requirement for conditional use permits *per se* but found that a city's use of review of such permits to come to a conclusion contrary to an EPA determination as to general health and safety issues is impermissible. This holding does not recognize preemption where, instead, a zoning authority is exercising an independent duty to regulate the location within a town of the various permitted uses.

Contrary to Upjohn's argument, the fact that North Haven permits some waste storage upon prior application and approval pursuant to §3.27.2.24 of its zoning regulations does not entitle Upjohn to approval of its decision to create and to make permanent a pile of waste for which approval was neither sought nor granted.

On the record presented, the court finds no reason not to adopt the view of the Second Circuit that the application of the North Haven zoning regulations is not preempted by RCRA or by state law in the situation presented.

THE COASTAL AREA MANAGEMENT APPLICATION

The Coastal Management Act, §§22a-90 C.G.S. *et seq.*, establishes a procedure by which a local zoning commission reviews a proposed project to determine its conformity both with municipal zoning regulations and with the provisions of the Act. Upjohn contends that the Commission erred in failing to find that its application complied with the Act. Section 22a-110 C.G.S. provides in relevant part that

> A coastal site plan required under this section may be modified or denied if it fails to comply with the requirements already set forth in the zoning regulations of the municipality. . . .

Having determined that the plan submitted related to a use of land that violated zoning regulations, the Commission had no cause to go on to determine whether the proposal complied with the Act. Its procedure was proper and its determination is supported by the evidence in the record.

CONCLUSION

None of the grounds asserted by the appellant have been established, and its appeal from the Commission's denial of its four applications is therefore dismissed.

/s/ Hodgson J
Beverly J. Hodgson
Judge of the Superior Court

Supreme Court, U.S.
FILED
APR 26 1991
OFFICE OF THE CLERK

No. 90-1471

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE UPJOHN COMPANY,
Petitioner,
v.
NORTH HAVEN PLANNING AND ZONING COMMISSION
and SCOTT SCHATZLEIN,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1471

THE UPJOHN COMPANY,

Petitioner,

v.

NORTH HAVEN PLANNING AND ZONING COMMISSION and SCOTT SCHATZLEIN,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONER

Respondents' brief in opposition makes two points unmistakably clear: that North Haven has simply banned Upjohn's waste pile from the Town and that the ban has no environmental justification. Because the Town regulation on which the ban rests is not based on environmental concerns, the ban falls outside the scope of RCRA's savings clause; and because the Town's measure is effectively absolute in prohibiting the waste disposal site, it threatens RCRA's commitment to the availability of safe disposal facilities. This case therefore squarely presents the issue whether such a ban—here, of a closed hazardous waste disposal facility that has specifically been found by the EPA to protect human health and the environment—is preempted by RCRA's policy of ensuring that communities take responsibility for their own waste problems.

1. Respondents now concede that the local regulation they rely on as barring Upjohn's waste pile is *not* an environmental regulation at all. Thus, the *only* regulation respondents rely on (*see* Br. in Opp. 6 n.3, 14-15 & n.8, 18 n.10) is the prohibition in Section 6 of the North Haven Zoning Regulations on any use of land that is not specifically allowed. *See* Pet. App. 65a (quoting regulation). That regulation, under the construction assumed by the courts below (and urged by respondents and adopted by the state court), flatly prohibits Upjohn's waste pile because the pile is not explicitly permitted. And, as respondents acknowledge, that regulation is not environmentally based: "the focus of the North Haven zoning regulations is on *land use* rather than environmental matters." Br. in Opp. 25. *See also* Br. in Opp. 14-15 (stressing land use basis); 18 (same).[1]

There can be no doubt that the Town has thus flatly banned Upjohn's waste pile, without any environmental basis. Although respondents attempt to suggest that the ban is site-specific, and not a Town-wide "ban" (Br. in Opp. 13-15), that suggestion is nothing but verbal quibbling. If the pile is prohibited in industrial areas by Section 6 of the Town's zoning regulations (as respondents

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[1] Respondents do not rely at all on Section 3.27.2.24 of the North Haven Zoning Regulations. The reason is evident: although that section authorizes the Town to choose to allow certain outdoor waste storage upon consideration of environmental and other factors (*see* Pet. App. 65a), the Town has not relied on such factors in banning Upjohn's waste pile, and respondents do not wish to be forced to justify the ban on environmental grounds. (Indeed, respondents concede that Upjohn's closure plan "complied with environmental standards for the closure of landfills containing hazardous wastes." Br. in Opp. 2.) Respondents insist that Upjohn's waste pile is flatly barred by Section 6's ban on any unlisted uses of industrial property, regardless of environmental safety. And the testimony of the zoning officer that respondents quote as explaining some of the basis for the ban confirms the absence of environment-based findings underlying the directive that Upjohn remove the waste pile from the Town. *See* Br. in Opp. 15 n.9.

insist that it is), it is prohibited anywhere in the Town. Certainly respondents do not suggest that there is some other site in the Town where the waste pile would be allowed under the Town's regulations. Hence, Section 6's "prohibition of the on-site permanent disposal of waste" (Br. in Opp. 14) is precisely the sort of local ban that, we urge, is preempted by RCRA.[2]

2. Given the lack of environmental basis for the Town's ban of Upjohn's waste pile, this case squarely presents the question whether a local government can, through a zoning regulation, ban waste disposal facilities from its jurisdiction without running afoul of RCRA. Respondents themselves have made clear that the "savings clause" of RCRA, 42 U.S.C. § 6929—which was at the heart of the court of appeals' and the district court's non-preemption rulings (Pet. App. 2a, 19a-20a)—cannot save the Town's ban. The savings clause preserves only regulations that are "more stringent" with respect to the environmental concerns that RCRA addresses; the local regulation respondents rely on, far from being more stringent in that sense, simply has nothing to do with environmental concerns at all. And we have explained in the petition why the congressional policy embodied in RCRA would be frustrated by localities' efforts to export their waste disposal problems to other communities. Pet. 14-22.

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[2] Respondents' argument (Br. in Opp. 13-16) that, in the courts below, Upjohn did not challenge the regulatory ban as inconsistent with RCRA—but merely challenged the particular directive as conflicting with the EPA/DEP approval decision—is patently incorrect. Indeed, the court of appeals stated that Upjohn "contends principally that the district court erred in concluding that RCRA does not preempt the Town's zoning regulations" (Pet. App. 2a), and the court then affirmed "the rulings of the district court that *federal law* and regulatory actions have not preempted the Town's zoning *regulations*." *Id.* at 3a (emphasis added). The district court, of course, held that "the local regulations are not preempted by RCRA" (*id.* at 20a) as well as that the EPA/DEP approval was not preemptive (*id.* at 20a-21a).

Respondents do not directly challenge that policy, but suggest instead that any local "land use" regulation is exempt from the policy. *See* Br. in Opp. 18-19. Yet RCRA's policy would be no less undermined if a community could achieve exactly the same result by putting the label "land use" on a regulation prohibiting a waste disposal facility. This case does not involve a community's decision to use zoning regulations to restrict hazardous waste disposal in (say) residential neighborhoods, while making provision for such disposal elsewhere in the community—such as in an industrial area where the waste was generated. Rather, it involves adherence to a policy that there is no place whatsoever in a particular community for the disposal of hazardous wastes that have been generated in industrial areas within its jurisdiction. Condoning such action would give communities a ready means of evading their RCRA responsibilities. Yet the courts below upheld the Town's action without demanding any environmental justification, including any possible justification concerning the impact of the waste pile on surrounding land uses.

Respondents also seek to avoid the anti-NIMBY policy of RCRA by noting that Congress, in 1984, sought to promote alternatives to *land* disposal of hazardous wastes. Br. in Opp. 21-23. But that congressional decision only highlights why RCRA's policy is in fact violated here. Congress expressly made its 1984 provisions governing landfills prospective only, applicable to *new* additions to landfills after certain dates but not to already existing landfills, such as Upjohn's, that no longer accepted wastes after those dates. *See* 42 U.S.C. § 6924. That decision confirms, rather than undermines, the congressional policy that communities should take responsibility for the hazardous waste problems that have already been generated in their jurisdictions. Congress did not allow communities, at least absent a sound environmental basis, to require enormously expensive removal of existing, closed land disposal facilities that have been found by EPA to protect human health and the environment.

3. The decision below, in respondents' own view, carries with it the sweeping implication that "land use" regulations have been approved as a means of allowing communities to escape their responsibility for dealing with locally generated waste. Review is also warranted because of the conflict with the decisions of other federal courts. *See, e.g., ENSCO, Inc. v. Dumas*, 807 F.2d 743 (8th Cir. 1986); *Ogden Environmental Services, Inc. v. City of San Diego*, 687 F. Supp. 1436 (S.D. Cal. 1988). Contrary to respondents' contentions (Br. in Opp. 24-26), those decisions cannot fairly be distinguished from the decision below on relevant grounds under RCRA.

Most important, both decisions rest fundamentally on the view, rejected by the Second Circuit here, that RCRA does not permit environmentally unjustified local actions that evade responsibility for safe waste disposal. The particular disposal facility at issue here is no less lawful under RCRA—and no less federally approved—than the disposal facilities at issue in *ENSCO* and *Ogden*. Moreover, the requirement of those cases that there be an environmental justification for any local refusal to permit a disposal facility cannot be evaded by a locality by the simple expedient of switching the labels on its action from "environmental" to "land use." Indeed, it would turn on its head the RCRA policy of ensuring safe disposal—as reflected, for example, in the savings clause's specific preservation only of "more stringent" regulations —to say, as respondents do, that no environmental defense of a local ban is required at all. Finally, it is immaterial that the Town's *purpose* in this case may not have been "to challenge federal authority." Br. in Opp. 26. It is the *effect* of the Town's action in impairing RCRA policy that renders its regulatory ban preempted. *See, e.g., International Paper Co. v. Ouellette*, 479 U.S. 481, 498 n.19 (1987) (relying on *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971), for the principle that the "effect rather than purpose of a state statute governs pre-emption analysis").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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